See also cases Nos. 270-471-472

CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 531

F. EUGENE NORTZ

vs.

THE UNITED STATES.

ON CERTIFICATE FROM THE COURT OF CLAIMS

FILED NOVEMBER 16, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 531

F. EUGENE NORTZ

vs.

THE UNITED STATES.

ON CERTIFICATE FROM THE COURT OF CLAIMS

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[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. 42605

F. EUGENE NORTZ

v.

THE UNITED STATES

Statement of Facts and Certificate

Messrs. Katz and Sommerich appeared for the plaintiff.
Messrs. George C. Sweeney, Alexander Holtzoff, William W. Scott, and Harry LeRoy Jones appeared for the defendant.

Before Chief Justice Booth, Judge Green, Judge Littleton, Judge Williams, and Judge Whaley.

STATEMENT OF FACTS

The Court of Claims hereby certifies that the record of the above-entitled case now pending before it discloses the following facts, stated in plaintiff's petition filed February 28, 1934:

1. That on January 17, 1934, and for a long time prior thereto, claimant was the owner and holder of gold certificates issued by the Secretary of the Treasury of the United States or by the Treasurer of the United States, of the face or nominal amount of $106,300—in the denominations and bearing the serial numbers set forth in the annexed Schedule A, wherein and whereby the defendant, pursuant to the acts of Congress appertaining thereto, certified that there had been deposited in the Treasury of the United States $106,300—in gold coin, which said gold coin the defendant certified would be paid to your claimant as the holder of said gold certificates on demand.

[fol. 2] 2. That under and pursuant to the laws of the United States in force at the time of the issuance of said gold certificates, at the time of the acquisition of same by your claimant and at all times up to and including Janu-

ary 17, 1934, a dollar in gold consisted of 25.8 grains of gold, .9 fine.

3. That by virtue of the agreement between your claimant, as the owner of said certificates, and the defendant, pursuant to whose authority said certificates had been issued, and the laws of the United States in such case made and provided relating to the issuance and redemption of such gold certificates, your claimant was entitled to receive from the defendant one ounce of gold for each $20.67 of gold certificates owned and held by him.

4. That heretofore and on January 17, 1934, your claimant duly presented the gold certificates owned and held by him as heretofore described and of the face value of $106,300, and demanded of the defendant that it redeem same by payment to claimant of gold coin to the extent and in the amount hereinbefore mentioned.

5. That on January 17, 1934, and for some time prior and subsequent thereto, an ounce of gold was of the value at least of $33.43.

6. That claimant, upon his demand as hereinbefore specified, was, by virtue of his ownership of the gold certificates, entitled to receive in redemption thereof 5,104.22 ounces of gold of the value of $170,634.07.

[fol. 3] 7. That the defendant refused to comply with your claimant's demand and refused to redeem said gold certificates in the manner specified therein and as prescribed by the laws of the United States.

8. That, in view of the penalties imposed under and by virtue of the Order of the Secretary of the Treasury, approved by the President of the United States on January 15, 1934, supplementing the Order of December 28, 1933, and the laws and regulations pursuant to which said Orders were issued, which said laws and regulations and said Orders, your claimant contends, were unconstitutional and invalid and constituted a deprivation of property without due process of law, and which invalid and unconstitutional Orders, laws and regulations required the delivery by your claimant of the gold certificates thus owned and held by him, your claimant delivered said gold certificates to the defendant under protest and received in exchange therefor under

protest currency of the United States in the sum of $106,-300, which currency was and is not redeemable in gold.

9. That your claimant accepted said currency in redemption of the gold certificates owned and held by him under protest solely by virtue of the coercion and threats contained in the aforesaid Orders, regulations and statutes.

10. That by reason of the circumstances aforesaid, your claimant was damaged in the sum of $64,334.07, which sum is now due and owing by the United States to your claimant, and no part of which has been paid.

[fol. 4] 11. That no action has been had on this claim in Congress or by any of the departments, except as hereinabove stated. The claimant is the sole owner of this claim, and the only person interested therein. No assignment or transfer of this claim or of any part thereof or interest therein has been made. The claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

12. That the claimant herein has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States of America.

13. That your claimant is and at all times herein mentioned was a citizen of the United States.

14. That the claimant believes the facts as stated in this petition to be true.

Wherefore, claimant demands judgment against the United States for the sum of $64,334.07 with any interest due thereon.

To this petition the defendant has filed a demurrer, on the ground that the petition does not state a cause of action against the United States.

The defendant, by the filing of this demurrer, admits the facts stated in the petition to be true, and upon the record before it the court finds it necessary for a proper disposition of the case that certain questions of law should be determined. They are as follows:

QUESTIONS CERTIFIED

1. Is an owner of gold certificates of the United States, Series of 1928, not holding a Federal license to acquire or

hold gold coins or gold certificates, who, on January 17, [fol. 5] 1934, had surrendered his certificates to the Secretary of the Treasury of the United States under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum inasmuch as the weight of a gold dollar was 25.8 grains, nine-tenths fine, and the market price thereof on January 17, 1934, was in excess of the currency so received?

2. Is a gold certificate, Series of 1928, under the facts stated in question 1 an express contract of the United States in its corporate or proprietary capacity which will enable its owner and holder to bring suit thereon in the Court of Claims?

3. Do the provisions of the Emergency Banking Act of March 9, 1933, and the Order of the Secretary of the Treasury dated December 28, 1933, requiring the plaintiff as owner of gold certificates as stated in question 1 to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount, not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States?

It is respectfully requested that the Supreme Court of the United States give appropriate instructions on the above questions and certify and transmit and refer the same to the Court of Claims of the United States for its [fol. 6] guidance in the further progress of the case.

Fenton W. Booth, Chief Justice. Wm. R. Green, Judge. Benjamin H. Littleton, Judge. T. S. Williams, Judge. Richard J. Whaley, Judge.

[fol. 7] I, Willard L. Hart, Chief Clerk of the Court of Claims of the United States, do hereby certify that the foregoing certificate in the case of F. Eugene Nortz v. The United States, No. 42605, was duly filed and entered of record in my office by order of said court, and as directed by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

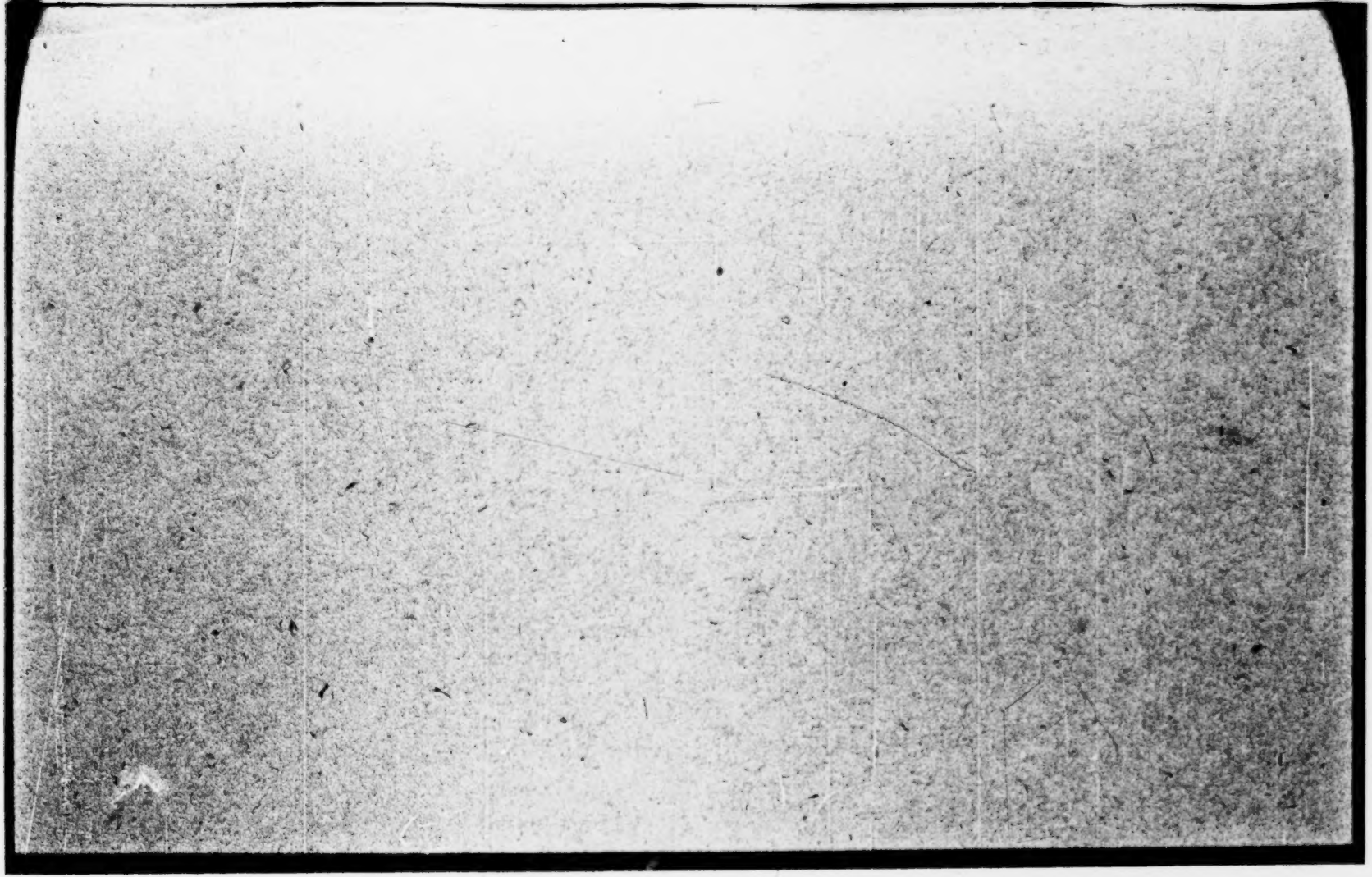
In testimony whereof I hereunto subscribe my name and affix the seal of the Court of Claims of the United States at

my office in Washington, D. C., this 14th day of November, A. D. 1934.

Willard L. Hart, Chief Clerk, Court of Claims of the United States. (Seal Court of Claims.)

[fol. 8] [Endorsed:] No. 42605. F. Eugene Nortz v. The United States. Questions certified by Court of Claims.

Endorsed on cover: File No. 39,159. Court of Claims. Term No. 531. F. Eugene Nortz v. The United States. Certificate. Filed November 16, 1934. File No. 531, O. T., 1934.



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No. 531

Supreme Court of the United States

OCTOBER TERM, 1934

F. EUGENE NORTZ

vs.

THE UNITED STATES

PLAINTIFF'S BRIEF

OTTO C. SOMMERICH,
Solicitor for Plaintiff.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
RAYMOND T. HEILPERN,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1934

No. 531

F. EUGENE NORTZ

v.

THE UNITED STATES

PLAINTIFF'S BRIEF.

Pursuant to Section 288 of Title 28, United States Code, Subdivision "A", the Court of Claims has certified to this Court three distinct questions of law, concerning which instructions are desired for the proper disposition of the above-entitled cause. The questions certified read as follows:

1—Is an owner of gold certificates of the United States, Series of 1928, not holding a Federal license to acquire or hold gold coins or gold certificates, who, on January 17, 1934, had surrendered his certificates to the Secretary of the United States* under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum inasmuch as the weight of a gold dollar was 25.8 grains, nine-tenths fine, and the market price thereof on January 17, 1934, was in excess of the currency so received?

2—Is a gold certificate, Series of 1928, under the facts stated in question 1 an express contract of the United States in its corporate or proprietary capacity which will enable its owner and holder to bring suit thereon in the Court of Claims?

---

*So in original.

3—Do the provisions of the Emergency Banking Act of March 9, 1933, and the order of the Secretary of the Treasury dated December 28, 1933, requiring the plaintiff as owner of gold certificates as stated in question 1 to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount, not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States?

Said questions were certified, after the Government had filed a demurrer to the petition herein.

STATEMENT.

The petition herein discloses the following facts, all of which the defendant, by filing its demurrer, admits to be true:

For a long time prior to January 17, 1934, the plaintiff was the owner and holder of gold certificates of the face or nominal amount of $106,300 (R. 1). The defendant, pursuant to the Acts of Congress appertaining thereto, certified in said gold certificates that there had been deposited in the Treasury of the United States $106,300 in gold coin, which said gold coin the defendant certified would be paid to the claimant as the owner of said gold certificates on demand (R. 1).

Under and pursuant to the laws of the United States in force at the time of the issuance of said gold certificates (the relevant statutes are set forth in an appendix to this brief), a dollar in gold, at all relevant times, consisted of 25.8 grains of gold, nine-tenths fine. By virtue of the agreement between the claimant, as the owner of

said certificates, and the defendant, pursuant to whose authority said certificates had been issued, your claimant was, pursuant to said statutes, entitled to receive from the defendant one ounce of gold for each $20.67 of gold certificates owned and held by him (R. 2).

On January 17, 1934, claimant duly presented his gold certificates and demanded of the defendant that it redeem same by payment of gold coin (R. 2). Claimant was entitled upon such demand to receive in redemption of his gold certificates 5,104.22 ounces of gold of the value of $170,634.07 (R. 2). Defendant refused to redeem the gold certificates by payment of gold coin (R. 2).

In view, however, of the penalties imposed under and by virtue of the order of the Secretary of the Treasury, approved by the President of the United States on January 15, 1934, supplementing the order of December 28, 1933, and the laws and regulations pursuant to which said orders were issued (the aforesaid orders and the laws pursuant to which same were issued are also set forth in the appendix to this brief), petitioner delivered the gold certificates to the defendant under protest and received in exchange therefor, also under protest, currency of the United States in the sum of $106,300, which currency was and is not redeemable in gold (R. 3). The claimant accepted said currency in redemption of his gold certificates solely by virtue of the coercion and threats contained in the aforementioned orders, regulations and statutes (R. 3).

There follow in the petition certain formal allegations and a demand for judgment in the sum of $64,334.07, representing the difference between the nominal value of the currency issued to claimant and the value of the gold which he was entitled to receive upon the tender of his gold certificates on January 17, 1934.

STATUTES INVOLVED.

Section 314 of the United States Code, Title 31, states the unit of value in the United States to be the gold dollar. Said section, unchanged since 1900, reads:

> "§314. *Standard unit of value.* The dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity."

Under Section 429 of said Title 31, the Secretary of the Treasury of the United States is authorized and directed to receive deposits of gold coin and to issue gold certificates therefor, with the proviso that:

> "* * * the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose."

Section 428 of the same Title authorizes the Secretary of the Treasury to receive deposits of gold bullion and issue certificates therefor upon the same conditions.

It was pursuant to these statutes, quoted in the appendix to this brief, that the gold certificates of the issue of 1928, owned and held by the petitioner on January 17, 1934, were issued by the defendant.

ARGUMENT.

Plaintiff submits:

(1) that, by virtue of his ownership of the gold certificates, a contract arose between him and the United

States, whereby the United States Government agreed, upon presentation of these certificates, to redeem same by the payment to petitioner of gold of the weight and fineness specified by statute at the time of acquisition of ownership by the petitioner and at the time of the tender by him of said certificates for redemption;

(2) that the provisions of the Emergency Banking Act of March 9, 1933 and the Order of the Secretary of the Treasury dated December 28, 1933, requiring the claimant, as the owner of gold certificates, to deliver same to the Treasury of the United States in exchange for currency of an equivalent amount, not redeemable in gold, is a repudiation of the contract embodied in the certificates and a taking of property within the meaning of the Fifth Amendment to the Constitution, and that upon such taking the defendant was required to pay just compensation to the petitioner for this property;

(3) that the issuance to petitioner of currency not redeemable in gold, of a face amount equal to the nominal value of the gold certificates, was not just compensation under the Fifth Amendment, that the Act of Congress and the Executive Orders, specifying, in effect, that such currency was to be deemed just compensation for the gold certificates condemned, are, under the Fifth Amendment, unconstitutional, and that, therefore, the petitioner is entitled to receive from the United States a further sum based upon the market price of gold on January 17, 1934.

LAW.

I

The Gold Certificates, Series of 1928, Owned by the Petitioner, Constituted an Express Contract of the United States in its Corporate or Proprietary Capacity, Whereby the United States Government Agreed, Upon Presentation of the Certificates, to Redeem Same in Gold in the Amount Specified by Statute at the Time of the Tender of the Certificates for Redemption.

The Government concedes, by its demurrer to the petition, that, pursuant to the Acts of Congress appertaining thereto, the defendant certified in the gold certificates owned by claimant that there had been deposited in the Treasury of the United States $106,300 in gold coin, and further certified that said gold coin would be paid to claimant as the holder of said gold certificates on demand (R. 1).

It is conceded by the Government that the gold certificates sued upon contain the following words:

"This certifies that there have
been deposited in the Treasury of

THE UNITED STATES OF AMERICA
ONE THOUSAND DOLLARS

in gold coin payable to the bearer on demand

This certificate is a legal tender
in the amount thereof in payment of all
debts and dues public and private."

On the reverse side appear the following words:

"THE UNITED STATES OF AMERICA
ONE THOUSAND DOLLARS".

The very language thus used upon the gold certificates, therefore, contains a promise to pay gold coin to the bearer of the certificate upon demand.

This interpretation of the agreement is fortified by reference to the relevant statutes bearing upon the issuance of gold certificates by the United States Government. Sections 314, 428 and 429 of the United States Code Annotated, Title 31, have heretofore been discussed and are set forth at pages 42-44 of the appendix to this brief.

Since, under Section 314 of Title 31 of the United States Code Annotated, the dollar consisted of 25.8 grains of gold, nine-tenths fine, it is apparent that the petitioner, upon the tender of his gold certificates, was entitled to receive from the defendant for each dollar of gold certificates tendered 25.8 grains of gold, nine-tenths fine.

That this is the proper interpretation to be accorded to the statutes is conclusively demonstrated by the case of *Bank of Boston* v. *United States*, 10 Court of Claims, 519, aff'd. 96 U. S. 30. Plaintiff therein, the owner of gold certificates, tendered same for redemption. By virtue of the fraud of an employee of the United States Assay Office in Boston, these certificates were cancelled by the defendant without the issuance to the plaintiff of the gold called for by the certificates.

Plaintiff thereupon sued to recover gold coin equivalent to the nominal value of the certificates tendered by it. Though the case was complicated by the question of who was to be liable for the fraud of this employee of the United States Government, decision was finally rendered in petitioner's favor *and the judgment called for the payment to petitioner of the face amount of the certificates, payable in gold* (p. 548).

In the course of his opinion, Chief Justice Drake of the Court of Claims stated (pp. 544, 545):

> ". . . for when Smith deposited them in the sub-treasury, the claimant ceased to have any property in the particular certificates deposited, and in lieu thereof stood the obligation of the Government to pay the claimant the amount of those certificates in gold coin; which obligation is to this day unfulfilled."

In his concurring opinion, Judge Nott clearly stated the relationship existing between the claimant and the United States Government arising out of claimant's ownership of the gold certificates. We quote from this opinion (p. 546):

> "But the gold-certificates themselves formed an express contract; and the covenant of the United States, as evidenced by that contract, was to pay what the cashier of the State Bank in fact came to receive—gold coin. He performed the only obligation cast upon the bank, that of presenting the certificates for payment; and the Government is bound to perform the remaining obligation cast upon it, that of paying the coin, unless it can show a stronger title or superior equity."

Though the question of the form of remedy was not discussed in the opinion in the United States Supreme Court, the judgment, decreeing that plaintiff was entitled to payment of the face amount of the certificates in gold coin, was affirmed, the final paragraph of the opinion of Justice Swayne reading (p. 36):

> "The appellee recovered below the amount claimed. A different result here would be a reproach to our jurisprudence."

Another aspect of this case was presented to the Court of Claims in *State National Bank of Boston* v. *The United States*, 24 C. of C., 488. The Court again decreed payment of the claim in gold coin (p. 504).

Thus, the statutes and decisions construing the statutes conclusively sustain petitioner's contention that the gold certificates embodied an express agreement between the holder thereof, in this case the petitioner, and the United States Government, for the redemption by the United States Government of these certificates, upon presentation, in gold coin of the weight and fineness specified by statute.

In this connection, it must be borne in mind that, at the time of the presentation of the certificates by petitioner, the gold content of the United States dollar had not been deflated and that Section 314 of the United States Code, Title 31, heretofore quoted, was still in effect.

That both the Legislative and Executive branches of the Government deemed gold certificates to be the equivalent of gold, by reason of the provisions therein contained that they are to be redeemed by payment of gold, is definitely established by reference to the Emergency Banking Act of March 9, 1933 and the orders issued thereunder. Gold bullion, gold coin and gold certificates are all classed in one group, and the resident of this country was required to surrender to the Government gold bullion, gold coin and gold certificates. If Congress and the Executive Department had not assumed that the owner of the gold certificate had the contract right to present same to the Government and demand in exchange therefor a specified amount of gold, why did the defendant think it necessary to compel the citizen to surrender this gold certificate?

Under subdivision 1 of Section 250 of Title 28 of the United States Code (Judicial Code, §145), the Circuit Court of Claims has jurisdiction of all claims founded upon any contract, express or implied, with the Government of the United States. It follows, therefore, that

the owner of a gold certificate, upon the refusal by the United States to comply with the contract embodied therein, could bring suit thereon in the Court of Claims.

II

Congress Could Not, Even in the Emergency Prevailing During 1933, by Virtue of Its Plenary Power to Regulate the Currency System of the United States, Deprive Petitioner of His Contract Right to Have His Gold Certificates Redeemed in Gold, Without Providing for the Payment to Petitioner of Just Compensation.

It having once been established that, on January 17, 1934, petitioner was the owner and holder of a contract with the United States Government calling for the payment to him of gold coin in the sum of $106,300., it is indisputable that neither Congress nor the Executive Department could deprive petitioner of this contract, without paying just compensation therefor.

We do not in any wise dispute the Government's contention that Congress has plenary power to regulate the currency system of this country. Such plenary power however is subject to the constitutional provision embodied in the Fifth Amendment that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of*

law; nor shall private property be taken for public use, without just compensation." (italics ours)

We submit that a taking of the contract thus owned by the petitioner, without payment of just compensation, is a violation of the Fifth Amendment and that petitioner is entitled to maintain this action for the purpose of recovering the just compensation secured to him by the Constitution.

That a contract between a citizen of the United States and the United States Government is property which cannot be confiscated by the Government without making just compensation therefor, was recently held by this Court in the case of *Lynch* v. *United States*, 292 U. S. 571, 54 S. Ct. 840. That suit involved the constitutionality of the Act of March 20, 1933, commonly called the Economy Act, whereby the United States sought to terminate its liability on certain of the war risk insurance policies theretofore issued by it. Plaintiffs, suing on such policies, contended that Congress was without power under the Fifth Amendment to repudiate this agreement. The Court, in upholding claimant's contention, stated per Mr. Justice Brandeis (p. 843):

> "Second. The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238, 6 S. C. 1038, 30 L. Ed. 173; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67, 41 S. Ct. 439, 65 L. Ed. 825. When the United States enters into contract relations, its rights and duties therein are governed generally by

> the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the Federal police power or some other paramount power."

The Government contended that the action of Congress repudiating these contracts was justified by the universally admitted emergency necessitating economy in the administration of the National Government. The Court, in rejecting the contention that the necessity for economy justified the repudiation by the United States Government of valid contracts, stated (p. 844):

> "In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' *The Sinking Fund Cases,* 99 U. S. 700, 719, 25 L. Ed. 496."

The case of *Lynch* v. *United States,* supra, is but a reiteration of the principle established by the United States Supreme Court in the *Sinking Fund Cases,* 99 U. S. 700. Mr. Chief Justice Waite, writing for the Court in that case, stated (p. 719):

> "They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. *The United States are as much bound by their contracts as are individuals.* If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable." (italics ours)

The Fifth Amendment operates even in the great emergency created by war to protect a citizen of this country from confiscation of his contract rights without just compensation.

Thus, in *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 44 S. Ct. 471, claimant, prior to the entry of the United States into the World War, had contracted for the building of a ship and had made certain part payments on account of such contract. The United States thereafter expropriated this contract unto itself.

Claimant sued to recover from the Government the value of the contract thus taken over, claiming that, under the Fifth Amendment to the Constitution, the defendant, though it validly exercised its power in condemning the contract, was obliged to make just compensation to the former owner thereof.

The question of the form of liability of the United States Government in that case was of great importance. The cost of shipbuilding had increased enormously between the date of the original contract entered into by

the plaintiff and the time of its appropriation by the Government. Thus, the part payments made by plaintiff on account of the contract did not represent the true value to it of its agreement.

The Court, in holding that the claimant was entitled to recover from the Government the value of the agreement taken over by the United States during the wartime emergency, stated (p. 123):

> "By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the installments remaining to be paid under the contract. It is settled by the decisions of this court that just compensation is the value of the property taken at the time of the taking. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340, 43 Sup. Ct. 564, 67 L. Ed. 1012; *United States* v. *New River Colleries,* 262 U. S. 341, 344, 43 Sup. Ct. 565, 67 L. Ed. 1014; *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306, 43 Sup. Ct. 354, 67 L. Ed. 664; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 341, 13 Sup. Ct. 622, 37 L. Ed. 463."

and further (p. 125):

> "Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking."

Therefore, two basic propositions have, we submit, been already sustained by the petitioner, to wit:

(1) that, on January 17, 1934, he was the owner and possessor of a valid agreement with the United States Government calling for the payment to him of $106,300. in gold coin;

(2) that the attempt of Congress to repudiate or confiscate this agreement, without making just compensation therefor, is in violation of the Fifth Amendment to the Constitution and that the constitutional provision authorizing Congress to regulate the currency system of the country does not excuse this violation of the Fifth Amendment.

III

Though, in the Exercise of Its Power to Regulate the Currency System of the United States, Congress, Undoubtedly, had the Authority to Appropriate, Under the Power of Eminent Domain, Gold Coins, Gold Bullion and Gold Certificates, Such Power Could Not Be Exercised Without Complying With the Provisions of the Fifth Amendment Calling for the Payment by the Government of Just Compensation for Property Thus Condemned.

We reiterate our concurrence in the Government's contention that Congress has complete authority to regulate the currency system of this country. We do not deny that, in exercising this authority, Congress had power to appropriate unto the Government outstanding gold bullion, gold coin and gold certificates. We do not deny that, in the exercise of this power, Congress had authority to compel all residents of this country to deliver unto the Government all gold bullion, gold coins and gold certificates in their possession.

We submit, however, that this power is subject to the constitutional limitation that no property shall be taken without the payment of just compensation.

We submit, further, that *it was not within the province of Congress to determine what should be just*

compensation, the determination of this issue being solely a judicial question.

The Act of March 9, 1933 authorizes the Secretary of the Treasury to compel

> "any and all individuals, partnerships, associations, and corporations to pay and deliver to the Treasurer of the United States any or all gold coin, gold bullion, and gold certificates owned by such individuals, partnerships, associations, and corporations."

Pursuant to this Act and subsequent legislation passed by Congress, various Executive Proclamations were issued, compelling persons in the United States owning gold bullion, gold coins or gold certificates to deliver same to the Government (see Order of the Secretary of the Treasury, dated December 28, 1933, quoted at pp. 49, *et seq.* of this brief).

By reason of this legislation and the Executive Orders and Proclamations issued thereunder, and in fear of the threats of criminal prosecution and confiscation embodied therein, petitioner herein, on January 17, 1934, delivered to the United States Government his gold certificates embodying the agreement described in Point I of this memorandum, and received in exchange therefor currency of the same face value, not redeemable in gold. These steps were taken by petitioner under protest and after he had first demanded redemption of his certificates in gold.

We have no argument with the Government's contention that Congress had the authority to compel petitioner to deliver unto the United States Government these valuable contract rights owned by him. Where we part with the Government is on the issue of the power of Congress to determine what should be just

compensation to the petitioner for the condemnation of this property.

Our courts have uniformly held that, though the Government has, under the power of eminent domain, the sovereign right to commandeer any property it deems essential for the exercise of its governmental functions, such power is subject to the limitation contained in the Fifth Amendment that, upon the taking of such property, the Government is obliged to pay just compensation, which compensation is to be determined, not by the Legislature or by the Executive, but by the Courts.

Thus, there can be no denial of the sovereign power of the United States Government to regulate interstate commerce. Such authority is expressly given to the central government along with the power to regulate the currency system. Yet, the Supreme Court has definitely determined that the plenary power of the Government to regulate commerce is at all times subject to the provisions of the Fifth Amendment compelling the Government to pay just compensation for all property taken while exercising this sovereign prerogative.

The courts have uniformly held that the taking of property by the Government gives rise to an implied promise to pay the fair value thereof.

> *United States* v. *Pacific R. R.*, 120 U. S. 227;
>
> *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 656-657, 5 Sup. Ct. 306, 311;
>
> *Langford* v. *U. S.*, 101 U. S. 341;
>
> *United States* v. *Russell*, 13 Wall. 623, 20 L. Ed. 474.

In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 13 S. Ct. 622, the defendant, exercising

the power of eminent domain, and for the purpose of the control and regulation of interstate commerce, had condemned certain property belonging to the petitioner. The agents of the Government refused to give compensation to the plaintiff, except in the manner and in the amount specified by the legislation authorizing the condemnation of the property.

The Court, sustaining the sovereign power of the United States to condemn any property which it deems essential for governmental purposes, held that a necessary incident to this power was the right of the person whose property is taken to receive just compensation therefor. Mr. Justice Brewer, delivering the opinion of the Court, stated (pp. 324, 325):

> "In the case of *Sinnickson* v. *Johnson,* 17 N. J. Law, 129, 145, cited in the case of *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner* v. *Newburgh,* 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. *It in no wise detracts from the power of the public to take whatever may be necessary for its uses;* while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, *and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.*" (italics ours)

Mr. Justice Brewer then pointed out that this natural equity, to wit, the right for just compensation, was secured to citizens of this country by the Fifth Amendment to the Constitution, writing (p. 325):

> "The language used in the fifth amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government; the last (the one in point here) being: 'Nor shall private property be taken for public use without just compensation.'"

That all of the powers given to Congress, including the power to establish post offices and post roads, the power to regulate the currency system, to regulate interstate and foreign commerce, are subject to the limitation of the Fifth Amendment that, in the exercise of such powers, the Government shall not take property without just compensation, was pointed out in the course of the opinion in the following language (p. 336):

> "But, like the other powers granted to Congress by the constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment, we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this fifth amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post offices and post roads; but, if Congress wishes to take private property upon which to build a post office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that prop-

> erty be improved under authority of a charter granted by the state, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. Because Congress has power to take the property it does not follow that it may destroy the franchise without compensation."

That the question of what is just compensation is to be determined not by Congress, but by the Judiciary, was distinctly stated by the Court (p. 327):

> "By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial, and not a legislative, question.* The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. *But when the taking has been ordered, then the question of compensation is judicial.* It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation." (italics ours)

The conclusion of the Court that, though the power to regulate commerce entitled the Government to condemn the property belonging to petitioner, the exercise of this power required the payment of just compensation, was well stated in the closing paragraph, where Mr. Justice Brewer wrote (p. 344):

> "These are all the questions presented in this case. Our conclusions are, that the navigation company rightfully placed this lock and dam in the Monongahela river; that with the ownership of the tangible property, legally held in that place, it has a vested franchise to receive tolls for its use; that

such franchise was as much a vested right of property as the ownership of the tangible property; that the right of the national government, under its grant of power to regulate commerce, to condemn and appropriate this lock and dam belonging to the navigation company, is subject to the limitations imposed by the fifth amendment, that private property shall not be taken for public uses without just compensation; that just compensation requires payment for the franchise to take tolls, as well as for the value of the tangible property; and that the assertion by Congress of its purpose to take the property does not destroy the state franchise."

See, also, the case of *United States* v. *Lynah,* 188 U. S. 445, 23 S. Ct. 349, where Mr. Justice Brewer, again writing for the Court, held (p. 464):

"The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary, and a governmental, right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of prop-

erty. The government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand. So, the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th Amendment guarantees that when this governmental right of appropriation—this asserted paramount right — is exercised it shall be attended by compensation.

"The government may take real estate for a post-office, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? *Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others.*" (Italics ours)

It follows from these decisions that, though Congress acted within its constitutional powers in condemning for governmental purposes the gold bullion, gold coins and gold certificates held by residents of this country, it exceeded its power when it sought to determine what should be just compensation for the property thus acquired. It is for the courts to determine what is just compensation (*Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 13 S. Ct. 622).

This term "just compensation" has frequently been defined by the courts.

In the very recent decision of *Olson* v. *United States,* 292 U. S. 246, 54 S. Ct. 704, Mr. Justice Roberts, delivering the opinion of the court, defined the term as follows (p. 708):

"That equivalent is the market value of the property at the time of the taking contemporaneously

paid in money. *Seaboard Air Line Ry* v. *United States,* 261 U. S. 299, 306, 43 S. Ct. 354, 67 L. Ed. 664; *Jacobs* v. *United States,* 290 U. S. 13, 17, 54 S. Ct. 26, 78 L. Ed.—; 2 Lewis, Eminent Domain (3d Ed.) § 682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes, and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340, 43 S. Ct. 564, 67 L. Ed. 1012. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Federal Constitutions. The Minnesota Rate Cases, 230 U. S. 352, 454, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18."

In the case at bar, it is evident that petitioner did not receive full value for the property condemned by the Government. That property thus condemned was a contract calling for the payment to petitioner of gold of the value of $170,634.07. In place of this fair value of his property thus seized, petitioner was paid in currency the sum of $106,300. Concededly, the $106,300 thus received by petitioner was received in the form of legal tender of the United States.

That a contract calling for the payment of a specified sum in gold cannot be satisfied by the delivery merely of currency of a similar face amount, even though such currency has been legally declared by Congress to be legal tender, has been frequently held by the courts

(*Bronson* v. *Rodes*, 7 Wall. 229; *Butler* v. *Horwitz*, 7 Wall. 258; *Bronson* v. *Kimpton*, 8 Wall. 444; *Trebilcock* v. *Wilson*, 12 Wall. 687; and *Gregory* v. *Morris*, 96 U. S. 619).

The Supreme Court, in all of the above cases, held that the obligee of a contract calling for a specified amount in gold was not obliged to accept payment of a like amount in legal tender, but was entitled to a judgment for a sum equivalent in value to the specified amount of the gold coin considered as a commodity.

Thus, in *Gregory* v. *Morris*, supra, decided in October 1877, after the decision in the last of the Legal Tender cases, Mr. Justice Waite, delivering the opinion of the Court, stated (p. 625):

> "If the contract had been in terms for the delivery of so much gold bullion, *there is no doubt but the court might have directed the jury to find the value of the bullion in currency, and bring in a verdict accordingly.* But we think, as was thought in *Bronson* v. *Rodes*, such a case is not really distinguishable from this. The question is not whether Gregory had the right to pay in gold dollars after his debt had become due, but whether, having wrongfully got the property into his possession without payment at all, the damages he is required to pay on account of this wrongful act must, as a matter of law, be estimated in gold, or whether they may be in currency. *We think it clear, that, under such circumstances, it was within the power of the court, so far as Gregory was concerned, to treat the contract as one for the delivery of so much gold bullion; and, if Morris was willing to accept a judgment which might be discharged in currency, to have his damages estimated according to the currency value of bullion.*" (italics ours)

In *Bronson* v. *Rodes*, supra, cited with approval in *Gregory* v. *Morris*, supra, the Court held (p. 250):

"Our conclusion, therefore, upon this part of the case is, that the bond under consideration was in legal import precisely what it was in the understanding of the parties, a valid obligation to be satisfied by a tender of actual payment according to its terms, and not by an offer of mere nominal payment. Its intent was that the debtor should deliver to the creditor a certain weight of gold and silver of a certain fineness, ascertainable by count of coins made legal tender by statute; and this intent was lawful."

Plaintiff therein was tendered in payment of his obligation currency of the face amount of the debt. The Court ruled that such tender was insufficient, stating (p. 254):

"It seems to us clear beyond controversy that the act must receive the reasonable construction, not only warranted, but required by the comparison of its provisions with the provisions of other acts, and with each other; and *that upon such reasonable construction it must be held to sustain the proposition that express contracts to pay coined dollars can only be satisfied by the payment of coined dollars.* They are not *'debts'* which may be satisfied by the tender of United States notes.

"It follows that the tender under consideration was not sufficient in law, and that the decree directing satisfaction of the mortgage was erroneous." (italics ours)

In *Butler* v. *Horwitz, supra,* the Court held that, where an agreement of lease provided for the payment of rent in gold and silver coin, the Court, despite the Legal Tender Act, would enforce such provisions with reference to the payment of rent and give damages accordingly, stating (p. 261):

> "We are of the opinion, therefore, that under the existing laws, of which, in respect to legal tender, the constitutionality is, we repeat, in this case, assumed, damages may be properly assessed and judgments rendered, so as to give full effect to the intention of parties as to the medium of payment. When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly."

Mr. Justice Field, delivering the opinion of the Court in *Trebilcock* v. *Wilson, supra,* stated succinctly the problem there involved (pp. 691, 692):

> "The principal question presented in this case for our consideration is, whether a promissory note of an individual, payable by its terms *in specie,* can be satisfied, against the will of the holder, by the tender of notes of the United States declared by the act of Congress of February 25th, 1862, to be a legal tender in payment of debts."

and held (p. 695):

> "This being the meaning of the terms *in specie,* the case is brought directly within the decision of *Bronson* v. *Rhodes* (7 Wallace, 229), where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in payment of debts."

IV

Since the Provisions of the Emergency Banking Act, and the Orders of the Secretary of the Treasury Issued Thereunder Denying the Holders of Gold Certificates the Right to Have Same Redeemed by Delivery of Gold as Specified in the Agreement, Are In Violation of the Fifth Amendment to the Constitution, and Since These Provisions Are Inseparable From the Remaining Portions of the Act and Orders, the Statute and Decrees Issued Thereunder Are Wholly Void and Unconstitutional.

We submit that the authorities cited in the previous points irrefutably establish that the provisions of the Emergency Banking Act and the decrees issued thereunder, limiting the holders of gold certificates to the receipt of currency of equal nominal or face value, not redeemable in gold, are in contravention of the Fifth Amendment.

It is not subject to dispute that this portion of the Act and the relevant provisions of the orders issued thereunder are inseparable and indivisible from the remainder of the law. To have given greater compensation to the holder of gold coin or gold certificates would obviously have resulted in disparity between the value of gold certificates and the other currency issues of the National Government. The whole purpose of the Emergency Banking Act and the subsequent legislation passed by Congress was to avoid just such disparity.

At the time of the issuance of these certificates, the Parity Act of 1900 (Section 314 of the United States Code, Title 31) imposed upon the Secretary of the Treasury the obligation to maintain all forms of money issued or coin of the United States on a parity with the standard unit of value (the gold dollar).

The intention of Congress to maintain this parity of currencies is emphasized by the enactment of the Thomas Amendment to the Agricultural Adjustment Act, empowering the President to direct the Secretary of the Treasury to take certain actions, if he, the President, finds such actions necessary in order to "maintain the parity of currency issues of the United States" (Section 821 of the United States Code, Title 31).

The intention of Congress to insure the parity of all currencies of the United States is conclusively established by reference to Public Resolution No. 10 of the 73d Congress, the title of which reads:

> "JOINT RESOLUTION To assure uniform value to the coins and currencies of the United States."

To hold valid, therefore, the remaining portions of the Emergency Banking Act of March 9, 1933 and to declare unconstitutional solely those provisions relating to the compensation to be paid to the holders of gold certificates, would do violence to the obvious legislative intent expressed in these enactments.

It follows that the whole Emergency Banking Act passed in March 1933 must be declared unconstitutional, and not merely those provisions relating to the compensation to be paid to the holders of gold certificates.

If the separation of the valid portion of a Congressional act from the unconstitutional portions thereof would do violence to legislative intent, then the whole of the act must be declared unconstitutional.

As stated in *Hill* v. *Wallace,* 259 U. S. 44, 42 S. Ct. 453, at p. 459:

> "Section 11 did not intend the court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain.

This is legislative work beyond the power and function of the court. In United States v. Reese, 92 U. S. 214, 221 (23 L. Ed. 563), presenting a similar question as to a criminal statute, Chief Justice Waite said:

'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.' "

The same rule of construction was enunciated in *Howard* v. *Illinois C. R. Co.*, 207 U. S. 463, 28 S. Ct. 141, where the court stated at page 146:

"Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated.

> All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois C. R. Co.* v. *McKendree,* 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153, and authorities there cited."

See also,

Allen v. *Louisiana,* 103 U. S. 80;

Poindexter v. *Greenhow,* 5 S. Ct. Rep. 903 (114 U. S. 270);

Connolly v. *Union Sewer Pipe Co.,* 22 S. Ct. 431 (184 U. S. 540).

The unconstitutionality of the legislation having once been established it follows that the Act never was law; that in legal contemplation it never had been passed. *Norton* v. *County of Shelby,* 6 S. Ct. Rep. 1121, 1125.

Therefore when on January 14, 1934, petitioner, as alleged in the statement of claim herein, presented his gold certificates for redemption and demanded payment thereof in gold he was entitled to receive gold, pursuant to his agreement with the Government.

The unconstitutional Act passed by Congress, which purported to bar petitioner's right to receive said gold, and pursuant to which the Government sought to repudiate its solemn agreement, could not in any way have affected the petitioner's rights. His express agreement with the Government survived the unconstitutional legislation.

The defendant by refusing to perform its agreement was guilty of a breach of an express contract. It is for the breach of this agreement that petitioner has sued,

and the jurisdiction of the Court of Claims, based upon the breach of this express contract, cannot be disputed.

REPLY TO ARGUMENT OF THE DEFENDANT

Defendant seeks to sustain the constitutionality of the Emergency Banking Act of March 1933 and the decrees issued thereunder upon the theory that, since Congress has plenary power to regulate the currency system of this country and since this legislation was enacted by virtue of the power thus granted, the breach of contract involved in the repudiation of the gold certificates does not give rise to a cause of action.

Assuming that Congress has plenary power to regulate the currency system, we contend that when the exercise of that power involves the condemnation by the United States of property belonging to one of its citizens, a correlative duty devolves upon the Government to make just compensation, within the meaning of the Fifth Amendment.

The Legal Tender Cases, 12 Wall. 457, are not relevant on this issue. As stated by Mr. Justice Strong in the Legal Tender Cases, which did not involve obligations payable in gold, the Fifth Amendment (p. 551):

> "has always been understood as referring only to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals."

The distinction is clear. By the Legal Tender Act the Government did not directly appropriate any individual's property. The injuries flowing from the act were merely consequential, and there is no dispute that the United States Government is under no duty to com-

pensate for consequential injuries suffered as a result of an Act of Congress.

In support of its demurrer, the Government in the Court below cited the decisions of this Court in *Horowitz* v. *United States,* 267 U. S. 458, and *Omnia Commercial Company* v. *United States,* 261 U. S. 502. Defendant urges that under the rule enunciated in the *Horowitz* case, the United States cannot be held liable in an action on an express contract for a breach thereof ensuing from its acts in its sovereign capacity. Plaintiff therein had entered into an agreement for the purchase of silk from an agency of the Government, the contract allegedly calling for delivery by a specified date. Subsequently, by a general order of the Administrator of Railroads, an embargo was placed upon such shipments generally, as a result of which delivery was not made on the contract date. Plaintiff sued to recover damages.

It is obvious that the general embargo involved in said case caused merely a consequential injury to plaintiff. Said embargo did not amount to a repudiation by the Government of its agreement for the sale of silk, nor did said embargo result in a commandeering by the Government of any property belonging to the plaintiff.

It is clear that, under the general principles of law, if plaintiff's agreement had been made with another citizen of this country and the aforementioned embargo had prevented performance thereof, plaintiff would have had no cause of action against his obligee.

> *United States* v. *Dietrich,* 126 Fed. 671, and cases cited at p. 674.

Similarly, there was no liability imposed upon the

Government by reason of its inability to perform due to the embargo by the Administrator of Railroads.

The decision in the *Horowitz Case, supra*, involved merely the application of the aforementioned principle that the United States Government is not responsible for a consequential injury flowing from its lawful acts.

In the case at bar, the legislation involved a definite repudiation by the United States Government of its express agreement with the holders of gold certificates. Said legislation, and the orders of the Secretary of the Treasury issued thereunder, resulted in a taking by the United States of this contract right.

Omnia Commercial Company v. *United States, supra,* is likewise inapplicable. There, the Government had requisitioned during the war a steel company's entire production of steel plate. Plaintiff was the owner of a contract, by which it had acquired the right to purchase a large quantity of steel plate from said company at a price under the market. Due to the requisition by the Government, the steel company failed to perform its obligation to plaintiff. Plaintiff brought suit against the Government. The Court recognized the general rule that, if the contract had been taken by the Government for a public use, the defendant would have been liable for just compensation, stating (43 S. Ct. 437):

> "The contract in question was property within the meaning of the Fifth Amendment (*Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 690, 17 Sup. Ct. 718, 41 L. Ed. 1165; *Cincinnati* v. *Louisville & Nashville Ry. Co.,* 223 U. S. 390, 400, 32 Sup. Ct. 267, 56 L. Ed. 481), and if taken for public use the government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense. To prevent the spreading of a

> fire, property may be destroyed without compensation to the owner, *Bowditch* v. *Boston,* 101 U. S. 16, 18, 25 L. Ed. 980, a doctrine perhaps to some extent resting on tradition. *Pennsylvania Coal Co., Inc.* v. *Mahon,* 260 U. S. 393, 43 Sup. Ct. 158, 67 L. Ed. —, December 11, 1922."

However, as a mere statement of the facts shows, the Government there had not taken any property belonging to the claimant. It had lawfully terminated the contract between claimant and the steel company. In the absence of a taking of property, there was no liability on the part of the Government. The distinction was pointed out by the Court (p. 439):

> "In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the government.
>
> "The government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound, the government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things."

It follows that the cases of *Louisville & N. R. Co.* v. *Mottley,* 219 U. S. 467, 31 S. Ct. 265; *Reichelderfer* v. *Quinn,* 287 U. S. 315, 53 S. Ct. 177; and *Mondou* v. *New York, N. H. & H. R. R. Co.,* 223 U. S. 1, 32 S. Ct. 169, are all likewise inapplicable.

In the first of the above-named cases the sole question presented to the court was the constitutionality of the provision in the Interstate Commerce Act prohibiting an

interstate carrier from collecting anything but money for transportation on its road. Said Act had been construed by the lower courts to render invalid an agreement entered into by the railroad, before the passage of the Act, whereby it had issued a lifetime pass in settlement of a claim. The court upheld the statute even though same resulted consequentially in abrogation of the contract for the issuance of the pass.

It is clear that the statute involved in said case in no wise amounted to a repudiation by the United States Government of any contract entered into by it, nor did it involve the taking of property by the Government.

The case of *Reichelderfer* v. *Quinn, supra,* is absolutely without relevance to the case at bar. In connection with condemnation of certain lands Congress had passed an Act whereby the lands thus condemned were set apart solely for park purposes. This was a general act and did not involve any contract with the owners of the adjoining property. Subsequently and pursuant to an Act of Congress, the Government decided to use the lands for a different purpose. Plaintiffs sued for an injunction claiming that, under the original statute setting apart the land for park purposes, they had been granted the right to insist that said lands be used for that purpose and that purpose only. The Court rejected this contention, the basis of the decision being that the original Act of Congress created no contract whatsoever between the plaintiffs and the Government.

We have shown that under the very wording of the certificates involved in the case at bar, and under the decision of this Court in *Bank of Boston* v. *United States,* 10 Court of Claims 519, an actual contract existed between petitioner and the Government.

Mondou v. *New York, N. H. & H. R. R. Co., supra,* also involved the question of the constitutionality of certain provisions of the Interstate Commerce Act, one of the provisions attacked being that which abrogated all contracts entered into by the carrier in contravention of the Act. No contract between either of the parties to the action and the United States Government was involved. Neither did the suit involve the condemnation by the United States Government of any property.

The Government argument that the Parity Act (Section 314 of Title 31 of the United States Code) was a warning to holders of gold certificates that their contract rights were subject to abrogation or modification in the event that such abrogation or modification were essential to maintain parity, is utterly without foundation.

Section 314 states the standard unit of value to be the Gold Dollar, consisting of 25.8 grains of gold, nine-tenths fine, and imposed upon the Secretary of the Treasury the duty to maintain all moneys issued or coined by the United States at parity with said standard. No warning whatsoever is given to the possessor of the gold certificate that the obligation of the Government was to be repudiated or modified so as to reduce the value thereof to the value of the other money issued or coined by the United States.

The wording of said statute clearly states the obligation of the Secretary *not* to maintain the value of the gold certificate on a parity with the value of the other money or coin of the United States, *but to maintain the value of such other money or coin on a parity with the standard for the gold dollar.*

The case of *Woodruff* v. *Mississippi* (1896), 162 U. S. 291, cited by the Government to sustain its contention that the gold certificates did not impose an ob-

ligation upon the Government to redeem same by payment of gold, is not at all relevant and clearly distinguishable. The Court distinctly found that "these bonds were not expressly payable in gold coin". The bonds contained merely the following contract (pp. 296, 297):

> "Know all men by these presents that the levee board of the State of Mississippi, district No. 1, under and by authority of the law mentioned in the caption hereof, hereby acknowledge themselves, for value received, indebted to the bearer in the sum of one thousand dollars in gold coin of the United States of America, which said sum the said levee board of the State of Mississippi, district No. 1, for themselves and their successors, do hereby bind themselves and engage well and truly to pay to the bearer * * *"

The Court stated that, in view of this peculiar wording, the obligation was to pay merely what the law recognized as money when the payment was to be made.

In the case at bar, the certificate of the Court of Claims shows that, upon its demurrer to the petition herein, the defendant admitted the following fact stated in the petition:

> "* * * the defendant, pursuant to the acts of Congress appertaining thereto, certified that there had been deposited in the Treasury of the United States $106,300—in gold coin, *which said gold coin the defendant certified would be paid to your claimant as the holder of said gold certificates on demand.*" (italics ours)

Furthermore, the gold certificates and the relevant statutes under which they were issued definitely state the promise (authorized by Congress) to pay the equivalent thereof in gold coin to the bearer on demand.

other money in exchange therefor, in view of the provisions of the order of the Secretary of the Treasury of December 28, 1933, issued by him under the authority of the Emergency Banking Act of March 9, 1933.

The petition attempts to plead a cause of action on an express contract. Consequently, the plaintiff may not maintain this suit on the theory that it is a claim for just compensation as for a taking by eminent domain. However, even if the plaintiff had any rights on the theory of eminent domain, he has already received full compensation, for the value of his gold certificates did not exceed the number of dollars represented by them,—and he has been paid that sum. Actually, no taking of property is involved, but merely an exchange of one form of currency for another consummated in the exercise of the sovereign power to regulate the currency. The constitutionality of the Emergency Banking Act is not involved in this case. The fact that the statute tenders what the Congress deems to be just compensation does not invalidate the statute.

II

The Court of Claims has no jurisdiction of this action. Gold certificates are money or a medium of exchange and do not constitute contracts of the United States in its corporate or proprietary capacity. The United States has never granted its consent to be sued on money.

ARGUMENT

I

ASSUMING THE COURT OF CLAIMS HAS JURISDICTION OF THIS SUIT, THE PLAINTIFF IS NOT ENTITLED TO RECOVER

A. GOLD CERTIFICATES, EVEN IF REGARDED AS CONTRACTS, ARE NOT WAREHOUSE RECEIPTS FOR A SPECIFIED QUANTITY OF GOLD, BUT ARE MONETARY OBLIGATIONS

The plaintiff's claim in this action proceeds upon the theory that a gold certificate constitutes a contract by which the United States has agreed to deliver to bearer a certain quantity of gold and as such is within the competency of the Court of Claims. This is the theory upon which the petition is framed, and unless it can be sustained the plaintiff must fail. The Government's position, on the other hand, is that even if a gold certificate be construed as a contract, it must be deemed a monetary obligation and not a commodity contract.

In ascertaining the meaning of gold certificates, the construction that the plaintiff attempts to place on them in his petition is, of course, not binding. The text of the gold certificates, of which the Court will take judicial notice, must prevail over the interpretation given to it in the petition. *Dillon* v. *Barnard*, 21 Wall. 430; *Equitable Life Assurance Soc.* v. *Brown*, 213 U. S. 25.

Gold certificates read as follows:

1000 1000

This certifies that there have been deposited in the Treasury of

THE UNITED STATES OF AMERICA
ONE THOUSAND DOLLARS

In gold coin payable to the bearer on demand

This certificate is a legal tender in the amount thereof in payment of all debts and dues public and private

1000 1000

On the reverse side appear the following words:

1000 1000

THE UNITED STATES OF AMERICA
ONE THOUSAND DOLLARS

1000 1000

Provision for the issuance of gold certificates was first made in the Act of March 3, 1863, (c. 73, 12 Stat. 709, 711) and was later embodied in Section 254 of the Revised Statutes (U. S. Code, Title 31, Sections 428, 429). The statute authorizes the Secretary of the Treasury to receive deposits of gold bullion and gold coin and issue therefor certificates in denominations of not less than $10. It is important to note that the gold certificates are to be issued not for a specified number of ounces of gold metal but for a specified number of dollars. All gold certificates are in dollar denominations.[24] There is no suggestion or intimation that they

[24] The statutes expressly so provide. See Appendix, *infra*, pp. 37–42.

could be issued lawfully in any other manner. Yet to justify the plaintiff's theory it would be necessary to construe the gold certificate statutes as authorizing the issuance of certificates representing a certain quantity of metal rather than a certain number of dollars. The text of the certificate itself specifies, in accordance with the requirements of the statute, a certain number of dollars and does not refer to any quantity of gold metal.

The last sentence of Section 5 of the Act of March 3, 1863 provides that certificates representing coin and bullion deposited or held in the Treasury shall not at any time exceed 20 percent beyond the amount of coin and bullion in the Treasury. In other words, for every one hundred dollars of gold deposited or held by it the Treasury was authorized to issue one hundred and twenty dollars of gold certificates. Obviously, that fact makes it impracticable to construe gold certificates as warehouse receipts for a certain quantity of gold, because if that were the fact the certificates would have to be issued only in exchange for the metal, dollar for dollar. Manifestly such an interpretation would present an impossible situation and would have frustrated the purposes of the statute.

It is illuminating in this connection to examine the debates in the House of Representatives relating to the Act of March 3, 1863. On the 22nd day of January, 1863, the provision here under discussion was being considered in the House of Repre-

sentatives and in reply to inquiries as to its meaning, the sponsor of the provision gave the following explanation (Congressional Globe, 37th Congress, 3d Session, Part I, p. 458):

> Mr. PENDLETON. If I understood the amendment, as read, it proposes not only that the certificates shall be issued for the payment of interest on the public debt to an amount of twenty per cent. more than there is bullion or gold in the Treasury, but it also provides for the issue of certificates to an amount of twenty per cent. more than the coin deposited in the Treasury by private individuals.
>
> Mr. HOOPER. I think that the gentleman understands the amendment correctly, if I understand his statement. * * * *It is really furnishing a sort of paper currency based upon specie. It is never to exceed the amount of specie deposited beyond twenty per cent.* That excess would be in payment for the public interest.
>
> * * * When the section was originally drawn, I will not say by whom, the words twenty per cent. beyond the amount deposited were left out. It was objected to the scheme that it was a mere convenience to the merchants, without any compensatory convenience to the Government. It was thought that to issue these notes in payment for the interest on the public debt would be some little convenience to the Government. In no case can the amount of the certificates issued

> exceed by one fifth the amount of the gold deposited. Why, sir, bank notes representing specie, according to the actual practice of the banks, are considered safe when there is five per cent. of the amount of gold in the bank to redeem the promises of the bank. But in this case, in reference to these certificates, there must always be eighty per cent. of gold in the Treasury to redeem such certificates. (Italics ours.)

The Congress has on a number of occasions amended and supplemented the Act of March 3, 1863, with respect to the issuance of gold certificates. The United States Code has combined some of this legislation in two sections (Title 31, Sections 428 and 429) dividing the legislative material on gold certificates roughly between deposits of gold bullion and deposits of gold coin. The statutory history makes no such division.

The Act of July 12, 1882, amended the prior statute by directing the Secretary of the Treasury to issue gold certificates against deposits of gold coin, such certificates to be in denominations of not less than $20. Subsequent legislation permitted the issuance of gold certificates against bullion and foreign gold coin.

Of great importance to this inquiry is the Act of March 14, 1900, in its provisions affecting gold certificates as well as all other coins and currencies of the United States. This statute, known as the Parity Act, provided that all forms of currency of

the United States, gold certificates, silver certificates, Treasury notes of 1890, and "greenbacks", should be maintained at a parity with the gold dollar and with one another, and made it the duty of the Secretary of the Treasury to maintain such parity. The Federal Reserve Act and the Act of May 12, 1933, contain similar provisions. This legislation cut through all prior legislation with respect to coin and currency. It reaffirmed the determination of the Congress that this country should not again be subjected to a dual monetary system with the different kinds of coin and currency fluctuating in value one against the other.

It is apparently the contention of the plaintiff that different forms of currency of the United States while legal tender for the same amounts shall in fact be treated as of different values. It is, however, the mandate of the Congress, rendered in the exercise of its paramount power to regulate the value of money, that every dollar coined or issued by the United States shall be of equal value and shall constitute legal tender for the same amount.

It is only by straining the phraseology of the face of the gold certificates and only by ignoring some of the legislation relative to them that any conclusion can be reached other than that they constitute obligations for the payment of no more than the number of dollars specified on their face.

B. ON JANUARY 17, 1934, CONTRACTUAL OBLIGATIONS TO PAY A SPECIFIED NUMBER OF DOLLARS COULD BE LAWFULLY LIQUIDATED BY PAYMENT OF THE AMOUNT IN ANY LEGAL TENDER CURRENCY, AND HENCE, THE DEFENDANT'S OBLIGATION TO THE PAINTIFF, IF CONTRACTUAL, HAS BEEN FULLY SATISFIED

We believe that we have demonstrated in the foregoing discussion that gold certificates are not obligations to deliver a specified number of ounces of gold, but merely to pay the number of dollars specified on their face. The plaintiff attempted to present for redemption gold certificates in the face amount of $106,300. Upon such presentation and demand, the Government at most became indebted to the plaintiff in the sum of $106,300. This indebtedness could be discharged in any form of legal tender which the Government chose to offer to the plaintiff. The petition admits that the plaintiff has received the sum of $106,300 in paper currency, which is legal tender. Consequently, nothing further is owing to the plaintiff.

The Act of May 12, 1933, as amended by the Joint Resolution of June 5, 1933, expressly provides that "all coins and currencies of the United States * * * heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private * * *." In view of that statute, the defendant was entitled to discharge any contractual obligation to the plaintiff in legal-tender currency and was not limited to liquidating it in gold metal.[24a]

[24a] The plaintiff does not question the validity of the Joint Resolution. (See plaintiff's brief, pp. 28, 39.) The constitutionality of the Joint Resolution is discussed in the Government's brief in Nos. 471 and 472, especially at pp. 53–58.

The *Legal Tender Cases*, 12 Wall. 457, upheld the constitutionality of the Legal Tender Act and established the proposition that the Congress has the power to make paper money legal tender for the payment of all debts. That proposition is no longer open to discussion in this Court. In fact, it is not disputed by the plaintiff in this case.

The opinions of this Court in the cases of *Bronson* v. *Rodes*, 7 Wall. 229; *Butler* v. *Horowitz*, 7 Wall. 258; and *Gregory* v. *Morris*, 96 U. S. 619, cited by plaintiff to sustain his argument that he is entitled to a judgment in a sum greater than the denominational amounts of his certificates (Plaintiff's brief, pp. 24, 25) do not support his contention. None of them holds that in an action on a contract made payable in gold coin judgment may be rendered for a sum in excess of the nominal amount of the obligation.

C. THE PLAINTIFF HAS SUSTAINED NO DAMAGE SINCE EVEN IF HE HAD RECEIVED GOLD COIN ON JANUARY 17, 1934, HE WOULD HAVE BEEN COMPELLED TO SURRENDER IT

Acting pursuant to the provisions of the Emergency Banking Act of March 9, 1933, the Secretary of the Treasury on December 28, 1933, promulgated an order requiring all persons in possession of gold coin and gold certificates to surrender the same to the Treasury[24b] and further providing that such persons should receive in exchange for gold coin or gold certificates, currency equal to the face amount of

[24b] The plaintiff concedes the existence of this power of the Congress as exercised in the Act. (Plaintiff's brief, pp. pp. 10, 15.) See, *supra*, p. 6.

the certificates. This order was in effect on January 17, 1934, when the plaintiff tendered his certificates. If he had received gold coin at that time, he would have been under an obligation to surrender it in exchange for the same amount of currency as was received by the plaintiff for his gold certificates. Assuming, however, that the plaintiff could have retained the gold coin, its value would not have been in excess of its face amount. Executive orders then in effect prohibited the export of gold coin and gold bullion and would have made it impossible for him to reach foreign markets. In the United States he could not have found a purchaser, since acquisition of gold coin and gold bullion was prohibited except under license, and even licensees were not permitted to acquire gold coin in any instance or gold bullion other than scrap gold from persons not licensed to hold the same. The only amount that he could have received for gold coin was the face value thereof or for gold bullion, $20.67 an ounce. The plaintiff received for his gold certificates the same amount as if he had received the gold coin or gold bullion to which he believes himself entitled and, in obedience to the orders, had surrendered such coin or bullion. His claim that he was damaged by the fact that he did not receive gold coin or gold bullion is, therefore, without foundation.

Were the plaintiff to recover in this action the judgment would be an unearned windfall, rather than compensation for loss sustained or damage suffered.

D. THE PETITION ATTEMPTS TO PLEAD A CAUSE OF ACTION ON AN EXPRESS CONTRACT. HENCE THE PLAINTIFF MAY NOT IN THIS SUIT CLAIM JUST COMPENSATION AS FOR A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE BY EMINENT DOMAIN

The plaintiff's petition endeavors to set forth a cause of action on an express contract in the conventional form. Apparently having but little confidence in the cause of action as pleaded he argues in his brief that he may recover on the theory that he is entitled to receive just compensation for the taking of his property by eminent domain. A plaintiff may not thus shift his position and endeavor to recover on a cause of action which he has not pleaded. Consequently, it is respectfully submitted that so much of the plaintiff's brief as is devoted to a discussion of his alleged rights to recover just compensation is irrelevant and should be ignored. It is further submitted that for the same reason the third question certified by the Court of Claims is purely a moot question and has no bearing upon the disposition of the present litigation.

E. EVEN IF THE PLAINTIFF HAD ANY RIGHTS ON THE THEORY OF EMINENT DOMAIN, HE HAS ALREADY RECEIVED JUST COMPENSATION

Even if the plaintiff were to amend his petition and seek to recover damages or compensation for an alleged taking of private property for public use, it would avail him nothing. Assuming for the sake of argument that there has been a taking, the amount that he has already received constitutes full and just compensation. As stated above, had the

plaintiff received gold coin on January 17, 1934, instead of paper currency, he could not have disposed of the gold coin for any greater sum. Moreover, an obligation to pay compensation for the taking of property may, like all other obligations, be discharged in any form of currency which the Government has declared to be legal tender. Consequently, payment in paper currency constitutes just compensation.

Title III of the Act of May 12, 1933, as amended by Section 2 of the Joint Resolution of June 5, 1933, has the effect of abrogating what might be called the gold clause of the gold certificates and of certain other forms of currency, if they are to be regarded as contractual obligations upon which suit may be maintained in the Court of Claims. The last mentioned enactment contains a sweeping provision making all coins and currencies, *heretofore* or *hereafter* coined or issued, legal tender for all debts. As Section 1 of the Joint Resolution of June 5, 1933, abrogates the gold clause in bonds and other similar obligations, so Section 2 of the Resolution has the effect of placing all coins and currencies of the United States on an exact equality for all purposes and thereby deprives the holders of gold certificates of the right to demand gold coin in exchange therefor.

There is nothing in the *Legal Tender Cases* that precludes the interpretation which we are advan-

ing. These decisions dealt with a situation presenting a dual monetary system under which different types of currency having different values circulated at the same time in competition with each other. In view of that circumstance, the prevailing opinion recognized the validity of an express obligation to pay a debt in a specific type of currency. The *ratio decidendi* does not apply to a monetary system in which there is a single standard for all types of currency, all of which are made interchangeable with one another. As was stated in *Deutsche Bank* v. *Humphrey*, 272 U. S. 517, 519, "an obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it."

The plaintiff contends that the Emergency Banking Act of March 9, 1933, is unconstitutional because Congress prescribed therein the compensation to be paid for gold certificates delivered pursuant to an order issued thereunder by the Secretary of the Treasury requiring the delivery of gold certificates. What relevancy that argument has in this case, does not appear. But in any event it finds no support in the authorities. The plaintiff relies upon *Monongahela Navigation Company* v. *United States*, 148 U. S. 312. That case is, however, inapplicable. It involved an Act of Congress authorizing the Secretary of War to condemn a

lock and dam for public use. The Act contained a provision that in estimating the sum to be paid by the United States, the franchise of the corporation to collect tolls should not be considered or estimated. The lower court in fixing the value of the property, ignored the value of the franchise. In reversing its action this Court held that the amount of compensation to be awarded was in the last analysis a judicial question and the action of the Congress on that point was subject to review. It did not hold that Congress might not tentatively fix compensation in the first instance.

The fact that the Congress in the Emergency Banking Act of 1933 fixed the amount of compensation to be awarded for gold certificates may perhaps not preclude the courts from inquiring into the justice of such compensation should the theory of eminent domain apply. Nevertheless the declaration by the Congress as to what compensation shall be paid does not of itself render the Act unconstitutional. The question is whether the Congress provided for just compensation, and it has been shown that just compensation was in fact provided and paid.

Even if an attempt by the Congress to determine what shall be the compensation would render unconstitutional an act of the character considered in the *Monongahela* case, it would not be controlling

in this case. The determination of the value of money and, conversely, the monetary value of property in terms in which money is defined, is expressly conferred by the Constitution upon the Congress. It is for the Congress to provide the monetary yardstick for the use of the courts [25] as well as others. Accordingly, where the thing taken and the compensation given was money, it would have been inappropriate for the Congress not to have determined the amount to be paid.

The Government, in substituting other paper money for gold certificates, dollar for dollar, was exercising its undoubted sovereign power to retire one form of currency and issue another in place thereof. There is no taking of private property for public use involved. The actual transaction was the exchange or substitution by the Government in its sovereign capacity of one kind of money for another, both being legal tender for the same amount.

The plaintiff confuses destruction of property with a taking of private property for public use. Where private property has been taken for public use, a contract implied in fact arises for the payment of just compensation, and suit for just compensation may then be maintained in the Court of

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[25] See for example the Act of April 2, 1792, providing for money of account and that "all proceedings in the courts of the United States shall be kept and had in conformity to this regulation." (C. 16 Sec. 20, 1 Stat. 250; R. S. Sec. 3563.)

Claims. On the other hand, if the Government destroys property without taking it for public use, there is no contract implied in fact to pay compensation. Inasmuch, however, as the jurisdiction of the Court of Claims is limited to actions on contract express or implied in fact, that tribunal may not entertain a suit for damages caused by the destruction of property. To abrogate a contract right is not to take private property for public use. To frustrate a contract is not to appropriate it. These principles were very clearly formulated and applied in *Omnia Commercial Company* v. *United States*, 261 U. S. 502, 508, 513:

> The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a "taking" in the constitutional sense. To prevent the spreading of a fire, property may be destroyed without compensation to the owner, *Bowditch* v. *Boston*, 101 U. S. 16, 18; a doctrine perhaps to some extent resting on tradition. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393. There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no rem-

edy is afforded. Contracts in this respect do not differ from other kinds of property.

* * * * *

In the present case the effect of the requisition was to bring the contract to an end, not to keep it alive for the use of the Government.

The Government took over during the war, railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the Government thereby took and became liable to pay for an appalling number of existing contracts for future service or delivery, the performance of which its action made impossible. This is inadmissible. Frustration and appropriation are essentially different things.

II.

THE COURT OF CLAIMS HAS NO JURISDICTION OF THIS ACTION AS GOLD CERTIFICATES ARE MONEY OR A MEDIUM OF EXCHANGE AND DO NOT CONSTITUTE CONTRACTS OF THE UNITED STATES IN ITS CORPORATE OR PROPRIETARY CAPACITY

Our discussion has thus far proceeded on the assumption, made for the sake of the argument only, that a gold certificate is a contract on which an action may be maintained against the United States in the Court of Claims under Section 145 of the Judicial Code, which confers upon that tribunal jurisdiction of actions against the United States on contracts express or implied. We respectfully submit, however, that actually a gold cer-

tificate is not such a contract and that consequently the Court of Claims has no jurisdiction of an action brought on gold certificates. The certificate is money. Money, be it coin or paper, is not a contract. It is a medium of exchange. As such it is created by the Government acting in its sovereign capacity, for the establishment and regulation of a monetary system is one of the paramount and basic powers of Government. This point has been discussed in full in our brief in Nos. 471 and 472 and will not be enlarged upon at this juncture. We have searched the books in vain for an action successfully maintained against the Government of the United States to recover on money as on a contract.

In this connection the defendant relies on *State National Bank of Boston* v. *United States*, 24 C. Cls. 488, and *Bank of Boston* v. *United States*, 10 C. Cls. 519, affirmed, 96 U. S. 30. Both of these cases involve the same suit. It was not an action to recover on gold certificates as contracts, but to recover on an implied contract arising out of the conversion of gold certificates by a Government officer to the use of the United States.

This Court in *Ling Su Fan* v. *United States*, 218 U. S. 302, 310–311, expressly recognizes that money or the medium of exchange has attributes quite apart from its intrinsic qualities. As the Court stated in that case, it bears "the impress of sovereign power which fixes value and authorizes * * * use in exchange." The Government in its corporate or proprietary capacity is not answerable for what it does in its sovereign capacity. *Horowitz* v.

United States, 267 U. S. 458. When it issues money the Government is not contracting in its corporate or proprietary capacity. It is exercising one of the fundamental functions of sovereignty.

As was forcefully said by this Court in the *Legal Tender Cases, supra*, at p. 545, "Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated."

Not only so, but the Constitution expressly confers upon the Congress the power to fix or regulate the value of money. Its action in respect of plaintiff's certificates is essentially tantamount to that. For reasons of public policy, deemed not only adequate but impelling, the Congress called in these certificates and stopped their circulation, but at once issued and handed over to plaintiff an equal amount, dollar for dollar, of other money, and which it had declared to be legal tender for all purposes. No doubt it has been or could have been used by him in the same manner as the certificates which were surrendered and with exactly the same effect.

Even if the Government, when the certificates were surrendered, had paid gold coin to the plaintiff, it is evident that there has not been a moment since that date, at which the plaintiff could have derived any greater benefit from the gold coin thus paid than from a corresponding amount, dollar for dollar, of any other kind of money in circulation. What could he have paid with it—no more debts, no more taxes. What could he have secured—no

more food, no more raiment, no more property, real or personal.

The plaintiff is not seeking "parity." He is seeking an opportunity to enrich himself upon a theory of disparity.

It needs no argument to demonstrate that in dealing with the currency and its metallic bases, the Government is dealing with a subject matter affected with a public interest. *Ling Su Fan* v. *United States, supra.* In the recent case of *Nebbia* v. *New York,* 291 U. S. 502, this Court clarified the Governmental power of regulating contracts in and prices of commodities belonging to that category and upheld its exercise in a situation where the legislature deemed its application essential in the interest of the public welfare. Surely, if a State legislature is empowered to regulate trading in milk, the Congress may do likewise in respect of gold, which lies at the basis of our currency system.

Moreover, this tribunal has invariably accorded great weight to the findings of the Congress setting forth the facts which show the necessity and propriety of the exercise of its powers and has imposed on those who seek to controvert them, the burden of sustaining the contention. *Block* v. *Hirsh,* 256 U. S. 135, 154; *Bunting* v. *Oregon,* 243 U. S. 426. No substantial effort to assume this burden has been made by those who are here attacking the monetary power of the Government.

CONCLUSION

We respectfully submit, therefore, that the first and second questions certified by the Court of Claims should be answered in the negative; and that the third question, if answered, should be answered in the negative.

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JANUARY 1935.

APPENDIX

STATUTES AUTHORIZING THE ISSUANCE OF GOLD CERTIFICATES

ACT OF MARCH 3, 1863, C. 73, 12 STAT. 709, 711

An Act to provide Ways and Means for the Support of the Government

* * * * *

SEC. 5. *And be it further enacted,* That the Secretary of the Treasury is hereby authorized to receive deposits of gold coin and bullion with the treasurer or any assistant-treasurer of the United States, in sums not less than twenty dollars, and to issue certificates therefor, in denominations of not less than twenty dollars each, corresponding with the denominations of the United States notes. The coin and bullion deposited for or representing the certificates of deposit shall be retained in the treasury for the payment of the same on demand. And certificates representing coin in the treasury may be issued in payment of interest on the public debt, which certificates, together with those issued for coin and bullion deposited, shall not at any time exceed twenty per centum beyond the amount of coin and bullion in the treasury; and the certificates for coin or bullion in the treasury shall be received at par in payment for duties on imports.

* * * * *

ACT OF JUNE 12, 1882, C. 290, 22 STAT. 162, 165

An act to enable national-banking associations to extend their corporate existence, and for other purposes.

* * * * *

SEC. 12. That the Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or assistant treasurers of the United States, in sums not less than twenty dollars, and to issue certificates therefor in denominations of not less than twenty dollars each, corresponding with the denominations of United States notes. The coin deposited for or representing the certificates of deposits shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; and such certificates, as also silver certificates, when held by any national-banking association, shall be counted as part of its lawful reserve; and no national-banking association shall be a member of any clearing-house in which such certificates shall not be receivable in the settlement of clearing-house balances: *Provided,* That the Secretary of the Treasury shall suspend the issue of such gold certificates whenever the amount of gold coin and gold bullion in the Treasury reserved for the redemption of United States notes falls below one hundred millions of dollars; and the provisions of section fifty two hundred and seven of the Revised Statutes shall be applicable to the certificates herein authorized and directed to be issued.

* * * * *

ACT OF MARCH 14, 1900, C. 41, 31 STAT. 45, 47

An Act To define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes.

SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine, as established by section thirty-five hundred and eleven of the Revised Statutes of the United States, shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity.

* * * * *

SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer or any assistant treasurer of the United States in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than twenty dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any national banking association may be counted as a part of its lawful reserve: *Provided,* That whenever and so long as the gold coin held in the reserve fund in the Treasury for the redemption of United States

notes and Treasury notes shall fall and remain below one hundred million dollars the authority to issue certificates as herein provided shall be suspended: *And provided further,* That whenever and so long as the aggregate amount of United States notes and silver certificates in the general fund of the Treasury shall exceed sixty million dollars the Secretary of the Treasury may, in his discretion, suspend the issue of the certificates herein provided for: *And provided further,* That of the amount of such outstanding certificates one-fourth at least shall be in denominations of fifty dollars or less: *And provided further,* That the Secretary of the Treasury may, in his discretion, issue such certificates in denominations of ten thousand dollars, payable to order. And section fifty-one hundred and ninety-three of the Revised Statutes of the United States is hereby repealed.

* * * * *

ACT OF MARCH 2, 1911, C. 190, 36 STAT. 964, 965

An Act To amend section six of the Currency Act of March fourteenth, nineteen hundred, as amended by the Act approved March fourth, nineteen hundred and seven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes, approved March fourteenth, nineteen hundred, as amended by the Act approved March fourth, nineteen hundred and seven, be, and

the same is hereby, further amended so as to read as follows:

"SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer, or any assistant treasurer of the United States, in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than ten dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any national banking association may be counted as a part of its lawful reserve: *Provided,* That whenever and so long as the gold coin and bullion held in the reserve fund in the Treasury for the redemption of United States notes and Treasury notes shall fall and remain below one hundred million dollars the authority to issue certificates as herein provided shall be suspended: *And provided further,* That whenever and so long as the aggregate amount of United States notes and silver certificates in the general fund of the Treasury shall exceed sixty million dollars the Secretary of the Treasury may, in his discretion, suspend the issue of the certificates herein provided for: *And provided further,* That of the amount of such outstanding certificates one-fourth at least shall be in denominations of fifty dollars or less: *And provided further,* That the Secretary of the Treasury may, in his discretion, issue such certificates in denominations of ten thousand dollars, payable to order: *And provided further,* That the Secretary

of the Treasury may, in his discretion, receive, with the assistant treasurer in New York and the assistant treasurer in San Francisco, deposits of foreign gold coin at their bullion value in amounts of not less than one thousand dollars in value and issue gold certificates therefor of the description herein authorized: *And provided further*, That the Secretary of the Treasury may, in his discretion, receive, with the Treasurer or any assistant treasurer of the United States, deposits of gold bullion bearing the stamp of the coinage mints of the United States, or the assay office in New York, certifying their weight, fineness, and value, in amounts of not less than one thousand dollars in value, and issue gold certificates therefor of the description herein authorized. But the amount of gold bullion and foreign coin so held shall not at any time exceed one-third of the total amount of gold certificates at such time outstanding. And section fifty-one hundred and ninety-three of the Revised Statutes of the United States is hereby repealed."

U. S. GOVERNMENT PRINTING OFFICE: 1931

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 531

F. EUGENE NORTZ

v.

UNITED STATES

ON CERTIFICATE FROM THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES CONTAINING EXCERPTS FROM LAWS OF OTHER COUNTRIES

BRITISH CURRENCY AND BANK ACT, 1928

* * * * *

Power of Bank of England to require persons to make returns of and to sell gold.

11. (1) With a view to the concentration of the gold reserves and to the securing of economy in the use of gold, the following provisions of this section shall have effect so long as subsection (1) of section 1 of the Gold Standard Act, 1925, remains in force.

(2) Any person owning any gold coin or bullion to an amount exceeding £10,000 in value shall, on

being required so to do by notice in writing from the Bank, forthwith furnish to the Bank in writing particulars of the gold coin and bullion owned by that person, and shall, if so required by the Bank, sell to the Bank the whole or any part of the said coin or bullion, other than any part thereof which bona fide held for immediate export or which is bona fide required for industrial purposes, on payment therefor by the Bank, in the case of coin, of the nominal value thereof, and in the case of bullion at the rate fixed in section 4 of the Bank Charter Act, 1844.

BANK OF CANADA ACT, JULY 3, 1934

(An Act to Incorporate the Bank of Canada)

* * * * *

SURRENDER OF GOLD

28. (1) Every chartered bank shall, on the day on which the Bank is authorized to commence business, transfer to the Bank all gold coin or bullion owned and held by it in Canada.

(2) The Governor in Council may from time to time thereafter require every chartered bank or every other person to transfer to the Bank any or all gold coin or bullion held in Canada which is owned by such chartered bank or by such other person; and the Governor in Council may authorize all measures deemed necessary or expedient to enforce any such transfer and to impose and recover penalties in respect of any neglect or refusal to make any transfer so required.

VALUATION OF GOLD

29. Whenever gold is sold by, transferred to, held as reserve by, or deposited with the Bank pursuant to subsections one or three of section twenty-five, section twenty-six, or section twenty-eight of this Act, the value of the said gold shall be computed on the basis established by the *Currency Act* at the date of the relevant transaction.

30. Any profits resulting from the sale by the Bank of gold coin and bullion transferred to the Bank pursuant to subsection three of section twenty-five, or section twenty-eight of this Act, or from an increase in the value of such gold resulting from any change in the monetary standard of Canada shall be paid by the Bank to the Receiver General for the Consolidated Revenue Fund: Provided, however, that the aforesaid provisions of this section shall not apply in the case of gold transferred under subsection one of section twenty-eight, if the Governor in Council is satisfied that the said gold was at that time of the transfer being held by a chartered bank against liabilities elsewhere than in Canada, and in such case the said profit shall belong to the chartered bank.

COMMONWEALTH BANK ACT OF 1929 (AUSTRALIA)

* * * * *

RETURNS OF HOLDINGS OF GOLD

7B. (1) Where the Treasurer [of the Commonwealth] is satisfied that it is expedient for the pro-

tection of the currency, or of the public credit of the Commonwealth, to obtain particulars of gold coin and bullion held by persons in Australia, or to require the exchange of any gold so held for Australian notes, he may, by notice in writing, authorize the board of [directors of the Commonwealth Bank]—

(a) To require persons to furnish particulars of the gold coin and bullion held by them; and

(b) To require persons to exchange for Australian notes any gold coin or bullion held by them.

(2) The board may, in pursuance of any authority given under the last preceding subsection, by notice in writing—

(a) Require any person to furnish to the bank particulars in writing of the gold coin and bullion held by that person; and

(b) Require any person to exchange with the bank for its equivalent in Australian notes any gold coin or bullion held by that person.

(3) For the purposes of this section—

(a) The equivalent of gold coin shall be the nominal value thereof, and of gold bullion shall be three pounds seventeen shillings and ten pence and one-half penny per ounce of the standard gold content of the bullion; and

(b) "Standard gold" contains eleven-twelfths fine gold.

(4) Any person who refuses or fails to comply with any requirement made under this section shall be guilty of an offence.

Penalty: A fine of one hundred pounds or imprisonment for one year or, in the case of a corporation, a fine of one thousand pounds.

EXPORT OF GOLD

7C. (1) Where, after the receipt of a recommendation from the board, the Governor-General is of opinion that it is expedient so to do, he may by proclamation prohibit the export of gold from the Commonwealth except in accordance with the provisions of the succeeding subsections of this section, and thereupon gold shall not, while the proclamation remains in force, be exported from the Commonwealth except in accordance with those provisions.

(2) Any person who desires to export gold from the Commonwealth may apply in writing to the board for the approval of the Treasurer of the export of the gold.

(3) Where, after the receipt of a recommendation from the board for such approval, the Treasurer is of opinion that it is expedient so to do, he may in his absolute discretion approve of any application under this section.

(4) Any person who exports gold without the approval of the Treasurer shall be guilty of an offence.

Penalty: A fine of one hundred pounds or imprisonment for one year or, in the case of a corporation, a fine of two per centum of the value

of the gold in respect of which the offence was committed but in no case less than one thousand pounds.

EXEMPTIONS FROM EXPORT PROVISIONS

7D. Nothing in the last preceding section shall prevent any person taking with him out of the Commonwealth gold of a value not exceeding twenty-five pounds.

RESERVE BANK OF NEW ZEALAND ACT, 1933

(An Act establishing the Reserve Bank of New Zealand)

* * * * *

ISSUE OF BANKNOTES BY RESERVE BANK

15. (1) On and after a date to be fixed by the Governor General by Proclamation, being not earlier than six months after the publication of such Proclamation in the *Gazette*, the Reserve Bank shall have the right to issue banknotes in New Zealand, and thereupon the authority of every other bank to issue banknotes in New Zealand or to reissue the banknotes of such bank in New Zealand shall cease and determine, anything to the contrary in any Act in the charter of any such bank notwithstanding. On and after the date herein referred to the banks shall redeem their outstanding notes only in Reserve Bank notes or in subsidiary coin to the extent to which such coin is for the time being legal tender in New Zealand. A

Proclamation shall not be issued under this section so as to take effect before at least seventy-five per centum of the capital of the Bank has been paid up.

(2) On the date proclaimed by the Governor-General in accordance with the last preceding subsection, or within such time thereafter as may be prescribed by the Governor-General in the same or in a later Proclamation, every bank carrying on business in New Zealand shall transfer to the Reserve Bank, in exchange for the equivalent value of bank notes of the Reserve Bank, or for credit with that bank, all gold coin or bullion then held by it on its own account.

(3) For the purposes of the last preceding subsection the equivalent value of gold coin in bank notes shall be the nominal value of such coin and the equivalent value of gold bullion in bank notes shall be an amount computed at the price of three pounds seventeen shillings and tenpence halfpenny an ounce of the standard gold content (meaning thereby gold containing eleven-twelfths fine gold) of such bullion.

(4) Any profits that may be derived by the Reserve Bank from the sale of gold coin and bullion transferred to it by any bank pursuant to the foregoing provisions of this section shall be credited to the Public Account.

U. S. GOVERNMENT PRINTING OFFICE: 1935

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Office Supreme Court
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DEC 12 19
CHARLES ELMORE

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1934.

No. 531.

F. EUGENE NORTZ,

Claimant,

against

THE UNITED STATES,

Defendant.

PETITION FOR LEAVE TO ARGUE AS *AMICUS CURIAE.*

GRANDIN TRACY VOUGHT.

THE BALLOU PRESS NEW YORK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 531.

F. EUGENE NORTZ, Claimant.

against

THE UNITED STATES, Defendant.

PETITION FOR LEAVE TO ARGUE AS *AMICUS CURIAE* IN THE ABOVE ENTITLED CASE, BY GRANDIN TRACY VOUGHT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes Grandin Tracy Vought and petitions the Court for leave to argue as *amicus curiae* in the above entitled cause, in a controversy which has arisen between the said F. Eugene Nortz and the United States, growing out of the refusal of the United States to redeem Gold Treasury Certificates, Series of 1928, and the expropriation of said Treasury Certificates and of the gold deposited for the redemption thereof by the United States.

The cause was heard in the Court of Claims of the United States on November 8, 1934, and your petitioner, with leave of said Court, submitted a written brief as *amicus curiae* and through associate counsel argued the cause orally in that Court.

No decision was rendered in the cause by said Court of Claims of the United States, but said Court certified certain questions to this Honorable Court for instruction, the said certified questions being as follows:

> 1—Is an owner of gold certificates of the United States, Series of 1928, not holding a federal license to acquire or hold gold coins or gold certificates, who, on January 17, 1934, had surrendered his certificates to the Secretary of the United States* under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum, inasmuch as the weight of a gold dollar was 25.8 grain, .9 fine, and the market price thereof on January 17, 1934 was in excess of the currency so received.
>
> 2—Is a gold certificate, Series of 1928, under the facts stated in question 1, an express contract of the United States in its corporate or proprietary capacity, which will enable its owner and holder to bring suit thereon in the Court of Claims.
>
> 3—Do the provisions of the Emergency Banking Act of March 9, 1933 and the order of the Secretary of the Treasury, dated December 28, 1933, requiring the plaintiff as owner of gold certificates, as stated in question 1, to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment of the Constitution of the United States?

Your petitioner desires to obtain leave of this Honorable Court to argue as *amicus curiae* in this cause, for the following reasons:

1. The questions involved are of far-reaching importance. Petitioner has made an exhaustive study of the questions involved in behalf of clients who surrendered $608,000 face amount of Gold Certificates under circumstances similar to

---

* So in original.

those presented in this cause. Petitioner believes that the results of his study on the subject can be more adequately stated and discussed through oral argument than through a written brief alone.

2. The main points which petitioner desires to discuss will be supplementary to and not repetitions of the argument of the attorneys for the claimant.

Counsel for claimant and the Solicitor General have stated that they have no objections to the granting of this petition.

WHEREFORE, your petitioner respectfully prays that leave be granted him to argue in this cause as *amicus curiae,* and your petitioner will ever pray.

Dated this 11th day of December, 1934.

GRANDIN TRACY VOUGHT,
Petitioner.

FILE COPY

DEC 19 1934
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 531.

F. EUGENE NORTZ,

Claimant,

against

THE UNITED STATES,

Defendant.

BRIEF OF GRANDIN TRACY VOUGHT AS *AMICUS CURIAE.*

THE BALLOU PRESS NEW YORK

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Supreme Court of the United States

No. 531.

F. EUGENE NORTZ, Claimant,

against

THE UNITED STATES, Defendant.

BRIEF OF *AMICUS CURIAE.*

This is a hearing upon questions certified by the Court of Claims concerning a petition which seeks judgment against the United States for $64,334.07 as an unpaid balance due for certain gold certificates, Series of 1928, formerly owned and held by the claimant.

Questions Certified to This Court.

The Court of Claims certified to this Court the following three questions concerning which instructions are desired:

> 1. Is an owner of gold certificates of the United States, Series of 1928, not holding a federal license to acquire or hold gold coins or gold certificates, who, on January 17, 1934, had surrendered his certificates to the Secretary of the United States* under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum, inasmuch as the weight of a gold dollar was 25.8 grains, .9 fine, and the market price thereof on January 17, 1934 was in excess of the currency so received?

* So in original.

2. Is a gold certificate, Series of 1928, under the facts stated in question 1, an express contract of the United States in its corporate or proprietary capacity, which will enable its owner and holder to bring suit thereon in the Court of Claims?

3. Do the provisions of the Emergency Banking Act of March 9, 1933 and the order of the Secretary of the Treasury, dated December 28, 1933, requiring the plaintiff as owner of gold certificates, as stated in question 1, to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States?

OUTLINE OF ARGUMENT.

I.

On the assumed facts, the petitioner, as owner of gold certificates, is entitled to receive a further sum from the United States.

A. The United States has expropriated trust property belonging to the claimant without making payment of just compensation.

1. The gold certificates held by petitioner were "trust receipts" issued by the United States.

2. The United States' refusal to redeem the certificates and the requirement of surrender of the certificates constituted an expropriation of the trust res.

3. The value of the trust res expropriated was in excess of the compensation provided for and paid.

B. Property in the nature of a contract was taken without payment of just compensation.

1. The gold certificates were contracts between the claimant and the United States for the payment of gold coin.

2. A contract is property within the provisions of the Fifth Amendment.

3. The expropriation under the National Banking Emergency Relief Act of March 9, 1933 and the Secretary's order of December 28, 1933 constituted a taking of the contract.

4. The compensation provided for in and paid under the National Banking Emergency Relief Act of March 9, 1933 and the order of December 28, 1933 was not equivalent to the value of the contract expropriated.

C. The United States cancelled its contracts with claimant without making just compensation.

1. The gold certificates were contracts between the claimant and the United States for the payment of gold coin.

2. The refusal to redeem the gold certificates and the requirement that they be surrendered to the United States constituted a cancellation of contract.

3. The amount of remuneration provided for in and paid under the National Banking Emergency Relief Act of March 9, 1933 and the order of December 28, 1933 was not just compensation.

D. Parallel cases clearly indicate that a further sum is due from the United States.

1. Cases arising out of legislative and executive acts in exercising the war power and the power of regulating

interstate commerce hold that all private property taken in the exercise of such power or powers must be compensated for at the market value at the time of taking.

2. *Horowitz* v. *United States*, 267 U. S. 458, is not in point.

3. *Ling Su Fan* v. *United States*, 218 U. S. 302, is not in point.

II.

An owner and holder of gold certificates described in the certified questions, to whom redemption has been refused and who has been compelled to surrender said certificates, may sue in the Court of Claims.

A. The Court of Claims has jurisdiction of this case as an action for compensation for cancellation of contract.

B. The Court of Claims has jurisdiction of this case as an action for compensation for expropriation of the certificates, or the gold represented by the certificates.

III.

There was a taking of property within the meaning of the Fifth Amendment.

A. Gold constituting trust property belonging to claimant was taken by the United States (See I, A, *supra*).

B. Property in the nature of a contract belonging to the claimant was taken by the United States (See I, B, *supra*).

IV.

Each certified question should be answered in the affirmative.

ARGUMENT.

I.

On the assumed facts, the petitioner, as owner of gold certificates, is entitled to receive a further sum from the United States.

A. The United States Has Expropriated Trust Property Belonging to the Claimant Without Making Payment of Just Compensation.

1. *The gold certificates held by petitioner were "trust receipts" issued by the United States.*

Each of the gold certificates in question was issued under § 429 of Title 31 of the United States Code. Each recited the following:

> "This certifies that there have been deposited in the Treasury of
>
> THE UNITED STATES OF AMERICA
>
> ONE THOUSAND DOLLARS
>
> in gold coin payable to the bearer on demand."

The United States Code, Title 31, Section 429, provides:

> "* * * and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose."

Thus the gold coin underlying these certificates was held specifically for their redemption and for no other purpose.

Any title of the United States to such gold coin was a trustee title with no beneficial interest therein in the United States. The gold coin was held on special deposit for a specific purpose. It follows that the gold certificates were trust receipts.

In the argument before the Court of Claims and the briefs submitted to the Court of Claims, counsel for the Government incorrectly placed great emphasis upon the last sentence of Section 428 as showing that the gold certificates were not trust receipts. Section 428 has no application whatever to these gold certificates issued under Section 429. Section 428 deals principally with issuance of gold certificates in exchange for gold bullion, and the last sentence thereof provides:

> "And certificates representing coin in the Treasury may be issued in payment of interest on the public debt, which certificates, together with those issued for coin and bullion deposited, shall not at any time exceed 20 per centum beyond the amount of coin and bullion in the Treasury."

This sentence is not a permission to issue 20 per cent more certificates than there are gold coins deposited for issuance of certificates. It is a permission to issue certain certificates in payment of interest upon the public debt. Further, it is a measure of and a limitation on the amount of certificates that can be issued in payment of interest on the public debt, under Section 428. It does not affect the amount or nature of the gold coin certificates issuable under Section 429—a section adopted years later.

Section 429 and not Section 428 deals with the issuance of gold certificates against deposits of gold coin. The language contained in Section 429 is susceptible only of the interpretation that the coins so deposited shall be retained in trust by the Treasury for the purpose of payment of the gold certificates issued against such coin and used for no other purpose.

The history of Sections 428 and 429 of United States Code (See Appendix A) clearly demonstrates that the last sen-

tence of Section 428 has no reference whatever to the gold certificates involved herein.

Section 5 of the act of March 3, 1863, is the original source of what is now Section 428. Section 12 of the act of July 12, 1882 is the original source of what is now Section 429. In so far as it related to the issuance of gold certificates against the deposit of gold coin, the act of March 3, 1863 was superseded by Section 12 of the act of July 12, 1882, and by Section 6 of the act of March 4, 1900, which was reenacted by the act of March 4, 1907 and again by the act of March 2, 1911.

The only certificates that were ever issued under the authority of the act of March 3, 1863, were issued between the dates November 15, 1865 and January 1, 1875 (see Report of the Treasurer of the United States, 1930, contained in Annual Report of the Secretary of the Treasury, 1930, p. 659). No other gold certificates were issued until after the passage of the act of July 12, 1882 (Annual Report of the Secretary of the Treasury, 1930, p. 660). The Treasurer in the report above referred to on page 660 further stated, "All issues of gold certificates at the present time are made under authority of the act of March 14, 1900 as amended". This act as amended is the present Section 429.

The trust relationship established by these statutory provisions and the gold certificates issued pursuant thereto has been recognized by the United States. The Secretary of the Treasury in his annual report for the year ending June 30, 1930, on page 29, set out the amount of gold coin and bullion and silver dollars held against outstanding gold and silver certificates and Treasury notes of 1890. In said report he captioned his discussion relative to this matter, "the Currency Trust Fund". In the tables contained on pages 604 and 607 of said report of 1930, the Secretary reported certain gold coin and bullion and silver dollars which, he stated, were "held in trust against gold and silver certificates (and Treasury notes of 1890)". On page 375 of the annual re-

port of the Secretary of the Treasury for the year June 30, 1933, the Secretary reported certain gold coin and bullion and silver dollars "held in trust against the gold and silver certificates (and Treasury notes of 1890)". In each of the annual reports of the Secretary of the Treasury from 1900 through 1933, there is a similar description of the nature of the gold certificates and the report for the year 1926 contains the following at page 80:

> "Gold and silver certificates certify on their faces, respectively, that 'there has been deposited in the Treasury of the United States of America dollars in gold (or standard silver dollars) payable to bearer on demand.' Gold and silver certificates are in fact mere 'warehouse receipts' issued by the Government in exchange for gold coin or bullion deposited in the one case, or standard silver dollars, respectively, withdrawn from the general funds of the Treasury."

2. *The United States' refusal to redeem the certificates and the requirement of surrender of the certificates constituted an expropriation of the trust res.*

The United States, as trustee in possession of trust property held for the holders of the certificates, by refusal to deliver gold coin upon demand to the certificate holders and by taking over the gold coin underlying the certificates expropriated the trust res. Admitting for this purpose that such action was justifiable as a valid exercise of the power to regulate coin and currency, nevertheless, the United States thereby obligated itself to pay just compensation for the property taken, pursuant to the requirement of the Fifth Amendment as follows:

> "Nor shall private property be taken for public use without just compensation."

3. *The value of the trust res expropriated was in excess of the compensation provided for* and paid.*

It is admitted by the demurrer to the petition and in certified question number 1 that the value of the gold represented by the certificates and expropriated by the Government under the National Banking Emergency Relief Act of March 9, 1933 and the order of the Secretary dated December 28, 1933 was in excess of the compensation provided for and paid to the holder.

Mr. Justice Roberts, who rendered the opinion for this Court in the recent case of *Olsen* v. *United States,* 292 U. S. 246 (1934), defined "just compensation" as follows, at pages 254 and 255:

> "The rule prescribed by the Minnesota constitution is not, at least so far as concerns these cases, to be distinguished from that expressed by the just compensation clause of the Fifth Amendment and implied in the due process clause of the Fourteenth Amendment to the Federal Constitution. The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324; 'In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (p. 326) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 399.

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* Unless this Court should construe "equivalent amount" contained in the National Banking Emergency Relief Act of March 9, 1933, to mean "equivalent" in value, in which case, the statute has been applied in an unconstitutional manner by the Executive branch of the government.

"That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306. *Jacobs* v. *United States*, 290 U. S. 13, 17. 2 Lewis, Eminent Domain, 3d Ed. § 682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden of the owner's bargain. *Vogelstein & Co.* v. *United States*, 262 U. S. 337, 340. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions. *Minnesota Rate Cases*, 230 U. S. 352, 454."

In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, the United States, in its regulation and control of interstate commerce, condemned certain property belonging to the claimant by an exercise of the power of eminent domain. Representatives of the Government refused to give compensation to the claimant except in the manner and amount specified by the legislation authorizing the condemnation of the property.

This Court sustained the power of the Federal Government to condemn the property, but held that a necessary incident to the exercise of this power was the right of the property holder to receive just compensation therefor and to have the amount of compensation determined judicially—not by Congress. Mr. Justice Brewer discussed this point as follows (pp. 324-328):

"In the case of *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.) 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all con-

stitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner* v. *Newburgh,* 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents, the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. * * *

"The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation', standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken * * *.

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say when compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 571, Mr. Justice McLean in his opinion referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Commonwealth* v. *Pittsburgh & Connellsville Railroad* 58 Penn. St. 26, 50; *Penn. Railroad* v. *Balt. & Ohio Railroad,* 60 Maryland, 263; *Isom* v. *Mississippi Central Railroad,* 36 Mississippi, 300.

"In the last of these cases, and on page 315, will be found these observations of the court: 'The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.'"

Chief Justice Waite, who wrote the opinion of the United States Supreme Court in the *Sinking-Fund cases*, 99 U. S. 700, stated at page 719:

> "They cannot legislate back to themselves without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the term of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

Lynch v. *United States*, 292 U. S. 571 (June 1934), involved the constitutionality of the Act of March 20, 1933, commonly called the Economy Act, whereby the United States sought to avoid any liability on certain war risk insurance policies previously issued by it. This Court sustained the plaintiff's contention that Congress was forbidden by the Fifth Amendment of the Constitution to repudiate the insurance agreement. Mr. Justice Brandeis, at page 579, said:

> "Second. The Fifth Amendment commands that property b not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war

> risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power."

The Court rejected the Government's contention that the existing emergency necessitated economy to such an extent that the attempted repudiation by the United States of its contracts was justifiable. Mr. Justice Brandeis at page 580 said:

> "In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or municipality or a citizen.' (*Sinking-Fund Cases,* 99 U. S. 700, 719.)"

Mr. Justice Butler in *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106 (*infra* p. 23) discussed "just compensation" at page 125:

> "Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking."

Accord: The language of Mr. Justice Butler in *Phelps* v. *United States,* 274 U. S. 341 (1927) at page 344:

> "The Government's obligation is to put the owners in as good position pecuniarily as if the use of their prop-

erty had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line Ry.* v. *United States,* supra, 304; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Liggett and Myers Tobacco Co.* v. *United States,* ante, p. 215."

In a radio address on or about August 28, 1934, the Secretary of the Treasury announced that the United States had made a profit of $2,800,000,000 by the devaluation of the gold dollar under the Gold Reserve Act of 1934. Had the United States paid the full value of the gold coin and the gold certificates at the times of their taking, this "profit" would not have existed. The "profit" arises only because the United States holding property in trust expropriated it without making just compensation. "It is a well settled rule that a trustee can make no profit out of his trust." *Magruder* v. *Drury,* 235 U. S. 106 at page 119.

B. Property in the Nature of a Contract Was Taken Without Payment of Just Compensation.

1. *The Gold Certificates were contracts between the claimant and the United States for the payment of gold coin.*

That each certificate constituted a contract between claimant and United States for the payment of gold coin is established.

In *Bank of Boston* v. *United States,* 10 Court of Claims 519; aff'd, 96 U. S. 30, the claimant therein, the owner of certain gold certificates, tendered the same for redemption. Said certificates were cancelled by the defendant without delivery to the plaintiff of the gold provided for in such certificates. Claimant thereupon sued to recover gold coin equivalent to the nominal value of the certificates tendered by it. The case was considerably complicated by the question of

who was liable for the fraud of an employee of the United States Government in the cancellation of the certificates, but decision was rendered in favor of the claimant and judgment was entered for payment to the claimant of the face amount of the certificates, payable in gold.

Mr. Justice Drake of the Court of Claims discussed the relationship between the holder of a certificate and the United States Government as follows (pp. 544, 545):

> "* * * for when Smith deposited them in the subtreasury, the claimant ceased to have any property in the particular certificates deposited, and in lieu thereof stood the obligation of the Government to pay the claimant the amount of those certificates in gold coin; which obligation is to this day unfulfilled."

This relationship was further discussed by Judge Nott in his concurring opinion (p. 546):

> "But the gold-certificates themselves formed an express contract; and the covenant of the United States, as evidenced by that contract, was to pay what the cashier of the State Bank in fact came to receive—gold coin. He performed the only obligation cast upon the bank, that of presenting the certificates for payment; and the Government is bound to perform the remaining obligation cast upon it, that of paying the coin, unless it can show a stronger title or superior equity."

Accord:

State National Bank of Boston v. *United States*, 24 Court of Claims 488.

2. *A Contract is property within the provision of the Fifth Amendment.*

Contracts are property within the provision of the Fifth Amendment, *Lynch* v. *United States*, 292 U. S. 571 (*supra*, p. 13), wherein Mr. Justice Brandeis said (p. 579):

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States."

Accord:

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106 (*infra*, p. 23);
Omnia Co. v. *United States*, 261 U. S. 502.

3. *The expropriation under the National Banking Emergency Relief Act of March 9, 1933 and the Secretary's order of December 28, 1933 constituted a taking of the contract.*

Claimant delivered the certificates to the United States under protest and received at the time $106,300 face amount of currency which was not redeemable in gold and which was admittedly of less value than the gold represented by the certificates so surrendered. The surrender was made in order to avoid the penalties imposed by the laws, regulations, proclamations and orders applicable. Such a surrender was in no sense voluntary but was due to legislative duress, and thus constituted a taking.

4. *The compensation provided for in and paid under the National Banking Emergency Relief Act of March 9, 1933 and the order of December 28, 1933 was not equivalent to the value of the contract expropriated.*

See discussion under I-A-3, *supra*, page 9.

C. The United States Cancelled Its Contracts With Claimant Without Making Just Compensation.

1. *The gold certificates were contracts between the claimant and the United States for the payment of gold coin.*

See Discussion *supra*, I-B-1 (p. 15).

2. *The refusal to redeem the gold certificates and the requirement that they be surrendered to the United States constituted a cancellation of contract.*

Admitting for this purpose that the refusal by the United States to honor the demand was based upon an exercise of

some paramount power of the Government, it was nonetheless a cancellation of the agreement, and placed upon the United States the obligation to pay just compensation.

Russell Motor Car Co. v. *United States,* 261 U. S. 514 (appealed from Court of Claims 1923).

This was a consolidation of three appeals from judgments of the Court of Claims fixing compensation for the cancellation of claimant's contracts with the government. In the first and third cases the contracts for the manufacture of anti-air craft gun carriages and brass shell cases were entered into through the Navy Department and were canceled by the Secretary of the Navy, by authority delegated under the Act of June 15, 1917. In the second case, the contract was with the Emergency Fleet Corporation, for the construction of barges, and was canceled through that agency under like authority.

The Court of Claims received evidence as to the value of the contracts on the date of cancellation and made its award on that basis. The Supreme Court, in affirming the judgments of the Court of Claims, through Mr. Justice Sutherland, said (p. 523):

> "In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company if it had been fully performed."

The Court of Claims held in *Nitro-Powder Co.* v. *United States,* 71 Court of Claims, 369 (1930) on the authority of *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, that the compensation to which the claimant was entitled was the value of the contract at the time it was canceled.

In *Grays Harbor Motor Ship Corp.* v. *United States,* 45 Fed. (2d) 259 (Court of Claims Dec. 1930), it was held that just compensation for cancellation of Government shipbuilding contracts required payment of an amount representing the total loss as of the time of cancellation.

Accord:

Wheeling Steel Corp. v. *United States,* 71 Court of Claims 571 (1931).

3. *The amount of remuneration provided for in and paid under the National Banking Emergency Relief Act of March 9, 1933, and the order of December 28, 1933, was not just compensation.*

See discussion under I-A-3, *supra* (p. 9).

D. Parallel Cases Clearly Indicate That a Further Sum Is Due From the United States.

1. *Cases arising out of legislative and executive Acts in exercising the war power and the power of regulating interstate commerce hold that all private property taken in the exercise of such power or powers must be compensated for at the market value at the time of taking.*

Whenever private property is taken for public use, it is the duty of the Courts to determine (1) whether or not the property is taken for a public use and (2) the amount of just compensation which should be paid therefor.

Shoemaker v. *United States,* 147 U. S. 282 (1892), wherein Mr. Justice Shiras at page 298 said:

> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made."

Monongahela Navigation Co. v. *United States,* 148 U. S. 312, *supra,* page 10, wherein Mr. Justice Brewer said (p. 327):

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

Regardless of what power is exercised by the government in the taking of private property, the owner and holder of such property is guaranteed payment of just compensation by virtue of the Fifth Amendment.

Mr. Justice Brewer in his opinion for this Court in *United States* v. *Lynah*, 188 U. S. 445 (*infra*, p. 26), said (p. 464):

"The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. * * * All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

"The government may take real estate for a postoffice, a court house, a fortification or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Wherever in the exercise of its gov-

> ernmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

When private property is taken to facilitate an exercise of the war power, just compensation must be made to the former owner and holder of the property so taken.

An early statement of this rule was made by Mr. Justice Clifford for this Court in *United States* v. *Russell*, 13 Wallace 623 (1871), as follows (p. 627):

> "Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be

> justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

United States v. *New River Collieries Co.*, 262 U. S. 341 (1923), was an action to recover a balance alleged to be due as compensation for coal requisitioned by the United States under Section 10 of the Lever Act.

Between September 1919 and February 1921, the United States requistioned from the New River Collieries Company approximately 60,000 tons of coal for the use of the Navy. The President, acting through the Navy Department under the terms of the Lever Act, fixed the price paid as compensation. Such price was unsatisfactory to the owner who sued in the United States District Court for a sum which it considered would constitute just compensation.

The Lever Act, among other things, authorized the President to fix domestic prices, prevent hoarding of basic commodities and requisition basic commodities for the purpose of supplying the Army and Navy.

The Government, during the trial, attempted to have just compensation fixed on the basis of the domestic price or on the basis of a "real" value. The claimant, however, introduced evidence of export market prices over the objection of the Government. This Court held that the introduction of evidence of export market prices was proper and that the value of the coal in the export market should be considered as the correct figure for determining just compensation for the talking of the property.

On pages 343, 345, Mr. Justice Butler discussed the point as follows:

> "The United States contends that the court erred in refusing, under the circumstances disclosed, to allow it to introduce evidence of the 'real' value of the coal as distinguished from its market value, and in holding that spot export prices controlled in determining just compensation; and further that, even if such market prices

are taken, it was error to exclude evidence of domestic prices.

"Section 10 of the Lever Act in obedience to the Fifth Amendment provides for just compensation. The war or the conditions which followed it did not suspend or affect these provisions. United States v. Cohen Grocery Co., 255 U. S. 81, 88. The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken. Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, and cases cited. The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard. Monongahela Navigation Co. v. United States, 148 U. S. 312, 327. Where private property is taken for public use, and there is a market price prevailing at the time and place as of the taking, that price is just compensation. * * *

"Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking.

"The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market. The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal."

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106 (1924). The claimant, Brooks-Scanlon Corporation,

prior to the entry of the United States into the world war, had contracted with a shipbuilder in New Jersey for the building of a ship. After certain payments on account had been made by the claimant, the United States, following its entrance into the war, expropriated the contract. Claimant recognizing that the Federal Government could expropriate the contract claimed that under the Fifth Amendment the Government must pay just compensation therefor.

The cost of shipbuilding had greatly increased between the date of the making of the contract and the time of its expropriation by the Government. For this reason the part-payments previously made by the claimant did not represent the true value of the contract at the time of its expropriation. The Supreme Court held that the claimant was entitled to recover the value of the agreement taken over by the United States Government as of the time of taking. Mr. Justice Butler, at page 123, said:

> "By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the installments remaining to be paid under the contract. It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. Vogelstein & Co. v. United States, 262 U. S. 337, 340, 43 Sup. Ct. 564, 67 L. Ed. 1012; United States v. New River Colleries, 262 U. S. 341, 344, 43 Sup. Ct. 565, 67 L. Ed. 1014; Seaboard Air Line Ry. v. United States, 261 U. S. 299, 306, 43 Sup. Ct. 354, 67 L. Ed. 664; Monongahela Navigation Co. v. United States, 148 U. S. 312, 341, 13 Sup. Ct. 622, 37 L. Ed. 463."

Accord:

Seaboard Air Line Ry. v. *United States,* 261 U. S. 299 (1923);

United States v. *North American Co.,* 253 U. S. 330 (1920);

United States v. *Pacific Railroad,* 120 U. S. 227 (1887).

Whenever private property is taken to facilitate the exercise of the power to regulate inter-state commerce just compensation must be made to the former owner and holder of such property.

United States v. *Cress*, 243 U. S. 316 (1916). This action was brought in the District Court to recover compensation for the taking of land and water rights resulting from the construction and maintenance by the Federal Government of certain locks and dams on the Cumberland and Kentucky Rivers in aid of navigation upon those rivers. It was held that the Federal Government had power to improve navigable streams in the exercise of the power to regulate inter-state and foreign commerce, but that such exercise when private property is taken is in subordination to the Fifth Amendment. To this effect is the language of Mr. Justice Pitney at pages 319 and 326:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks (Barney v. Keokuk, 94 U. S. 324, 338; Packer v. Bird, 137 U. S. 661, 671; Hardin v. Jordan, 140 U. S. 371, 382; Shively v. Bowlby, 152 U. S. 1, 40, 58; St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (Shively v. Bowlby, 152 U. S. 1, 40; Gibson v. United States, 166 U. S. 269, 272; Scott v. Lattig, 227 U. S. 229, 243); the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation. * * *
>
> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment."

United States v. *Lynah,* 188 U. S. 445 (1903), was an action to recover from the United States compensation for certain real estate which was taken and appropriated purportedly under the exercise by the Government of its power of eminent domain and the regulation of interstate commerce. The United States by the construction of a dam flooded lands belonging to the claimant so as totally to destroy their value. The Supreme Court held that this was the taking of private property within the scope of the Fifth Amendment and that just compensation must be paid by the Government to the previous property owner. Mr. Justice Brewer, who wrote the opinion for the Court, discussed the point as follows at pages 464 and 471:

> "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount

right— is exercised it shall be attended by compensation.

"The government may take real estate for a post office, a court house, a fortification or a highway; or in time of war it may take merchant vessels and make them a part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others. * * *

"Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential, and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

Accord:

Monongahela Navigation Co. v. *United States*, 148 U. S. 312 (*supra*, p. 10).

2. *Horowitz* v. *United States*, 267 U. S. 458, *is not in point.*

The *Horowitz* case went to the Supreme Court on appeal from a judgment of the Court of Claims dismissing the petition upon a demurrer.

The petition alleged a contract with a Department of the United States to ship certain silk prior to March 4, 1920, and sought consequential damages for breach thereof. The petition further alleged that said failure to ship was caused by an embargo placed by the Railroad Administration on shipments of silk by freight. Neither the validity of the

embargo nor its effect in delaying the shipment was challenged by the petition.

The claimant had previously contracted to sell the silk to a silk company in New York. When the silk failed to arrive in New York by early shipment, the New York purchaser refused to carry out his purchase contract so that when the silk eventually arrived in New York on or about March 12, the consignee refused to accept delivery.

In this case, the government was not attempting to retain the silk for its own use or to cancel the contract.

The holding was that the United States is not liable for consequential damages resulting from breach of contract arising out of a proper exercise of a paramount power. It does not hold that the United States could have requisitioned the claimant's silk then in the possession of the United States for its own use without making payment of just compensation or that it could have cancelled the contract so as to retain the ownership and use of the silk without making just compensation. The impact of the embargo fell upon all contracts alike. The fact that the government was also a contractor and that its contract was affected along with all others was fortuitous. There is a fundamental distinction between a suit for consequential damages for breach of contract where no property is taken for public use and a suit for compensation for cancellation of contract or for the taking of property. Cases illustrating such distinction are discussed *supra*. The instant case seeks just compensation for cancellation of contract and taking of property—factors not present in the *Horowitz* case.

3. *Ling Su Fan* v. *United States*, 218 U. S. 302 (1910), *is not in point.*

Philippine law No. 1411 provided, among other things, that the exportation from the Philippine Islands of Philippine silver coins coined by authority of the Act of Congress of March 2, 1903, was prohibited. The plaintiff in error, in

violation of this statute, exported certain Philippine coined silver and was convicted for the same. In sustaining the conviction and affirming the judgment of the Supreme Court of the Philippine Islands, the United States Supreme Court, through Mr. Justice Lurton said, at page 310:

> "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. As an incident, the Government may punish defacement and mutilation and constitute any such act, when fraudulently done, a misdemeanor. Rev. Stat., §§ 5459, 5189."

The United States Supreme Court recognized that title to the coins was vested in the owner thereof. It further recognized that the coins had a certain bullion value aside from their quality of legal tender. The Court's holding in no way affects the question at bar for it was no broader than a holding that the sovereign might properly prevent exportation of the coin of the realm. There was no attempt to take over the property for the use of the Philippine Government; the statute merely regulated the use of coin as currency. The decision cannot in any way be interpreted as a holding that the sovereign could divest the holder of the title to his coin and take it over to itself without making proper and just compensation therefor.

II.

An owner and holder of gold certificates described in the certified questions to whom redemption has been refused and who has been compelled to surrender said certificates may sue in the Court of Claims.

A. The Court of Claims Has Jurisdiction of This Case as an Action for Compensation for Cancellation of Contract.

Section 145 of Judicial Code (U. S. Code Section 250) provides in part as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable * * *."

Discussion, *supra*, under I-B 1., page 15, demonstrates that the certificates are express contracts and hence suits thereon for compensation for cancellation are expressly allowed by the above quoted statute which confers jurisdiction upon the Court of Claims.

Accord:

> *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, *supra*, page 18.

B. The Court of Claims Has Jurisdiction of This Case as an Action for Compensation for Expropriation of the Certificates or the Gold Represented by the Certificates.

The rule is well established that where property is taken pursuant to an act of Congress for public use, the Government is under an implied obligation to make just compensation to the owner. In the instant case, property belonging to private individuals to which admittedly the Government claimed no title was taken for an alleged public purpose. Said property was in the form of contracts and in the form of gold itself held for the claimant.

The owner's claim for compensation is one arising out of an implied contract within the meaning of the statute defining the jurisdiction of the Court of Claims, whether or not there has been any formal procedure for the condemnation of the property so taken. This rule was clearly stated by Mr. Justice Harlan in *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645 (Appealed from Court of Claims 1884), at page 656, as follows:

> "In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106, *supra*, page 23, was an action in the Court of Claims to recover a balance alleged to be due as compensation for

the taking by the Government of the plaintiff's rights under a contract for the construction of a ship. It was held by the Supreme Court that the Court of Claims properly assumed jurisdiction of this matter.

Russian Volunteer Fleet v. *United States*, 282 U. S. 481 (Court of Claims 1931), was an action against the United States in the Court of Claims to recover just compensation for the requisition of contracts for the construction of two vessels. The Court of Claims dismissed the petition for want of jurisdiction. 68 Ct. Cls. 32. The Supreme Court issued a writ of certiorari. The Supreme Court reversed the judgment of the Court of Claims and held that such case properly fell within Section 145 of the Judicial Code giving to the Court of Claims jurisdiction over said suit. Mr. Chief Justice Hughes said at page 490:

> "Section 24, paragraph 20, of the Judicial Code, U. S. C. Tit. 28 § 41, subd. (20), gives jurisdiction to the District Courts of the United States, concurrent with the Court of Claims, of claims against the United States not exceeding $10,000, founded upon the Constitution, or any law of Congress, or upon any contract, express or implied, with the Government of the United States, when the claimant would be entitled to redress against the United States in a court of law, equity, or admiralty, if the United States were suable. The case of an alien friend is not excepted. Section 145 of the Judicial Code (U. S. C. Tit. 28, § 250) gives to the Court of Claims jurisdiction of suits on similar claims against the United States without limit of amount. The authority conferred upon the President by the Act of June 15, 1917, was exercised by him through the United States Shipping Board Emergency Fleet Corporation, and as the compensation fixed by that Corporation was not satisfactory to the petitioner, it became entitled under the express terms of the Act to bring suit against the United States to recover the amount justly payable by reason of the requisition."

Accord:

A. W. Duckett & Co., Inc. v. *United States*, 266 U. S. 149 (Appealed from Court of Claims 1924).

III.

There was a taking of property within the meaning of the Fifth Amendment.

A. **Gold Constituting Trust Property Belonging to the Claimant Was Taken by the United States.**

(See I-A, *supra*, pages 5 to 15.)

B. **Property in the Nature of a Contract Belonging to the Claimant Was Taken by the United States.**

(See I-B, *supra*, pages 15 to 17.)

IV.

Each certified question should be answered in the affirmative.

Dated: December 17, 1934.

Respectfully submitted,

GRANDIN TRACY VOUGHT,
Amicus Curiae.

ROY H. CALLAHAN,
Of Counsel.

APPENDIX A.

History of Sections 428 and 429 of the U. S. Code.

Section 5 of the Act of March 3, 1863, entitled "An Act to provide Ways and Means for the Support of the Government" was the first provision for the issuance of certificates against the deposit of gold coin or gold bullion. It provided as follows:

> "SEC. 5. AND BE IT FURTHER ENACTED, That the Secretary of the Treasury is hereby authorized to receive deposits of gold coin and bullion with the treasurer or any assistant-treasurer of the United States, in sums not less than twenty dollars, and to issue certificates therefor, in denominations of not less than twenty dollars each, corresponding with the denominations of the United States notes. The coin and bullion deposited for or representing the certificates of deposit shall be retained in the treasury for the payment of the same on demand. And certificates representing coin in the treasury may be issued in payment of interest on the public debt, which certificates, together with those issued for coin and bullion deposited, shall not at any time exceed twenty per centum beyond the amount of coin and bullion in the treasury; and the certificates for coin or bullion in the treasury shall be received at par in payment for duties on imports."

Section 12 of the Act of July 12, 1882, entitled "An Act to enable national-banking associations to extend their corporate existence, and for other purposes," contained a separate provision for the issuance of gold certificates against the deposit of gold coin as follows:

> "SEC. 12. That the Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or Assistant Treasurers of the United States, in sums not less than twenty dollars, and to issue certificates therefor in denominations of not less than

twenty dollars each, corresponding with the denomination of United States notes. The coin deposited for or representing the certificates of deposits shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; * * *"

This Act of July 12, 1882 apparently supersedes the Act of March 3, 1863 in so far as the former related to the issuance of gold certificates against the deposit of gold coin.

The substance of Section 6 of the Act of July 12, 1882 was readopted as Section 6 of the Act of March 14, 1900, entitled "An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes." Said section reads in part as follows:

"SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer or any Assistant Treasurer of the United States in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than twenty dollars and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any national banking association may be counted as a part of its lawful reserve: * * *"

Section 6 of the Act of March 14, 1900, *supra,* was amended by the Act of March 4, 1907, entitled "An Act to amend the national banking Act, and for other purposes." The portion of Section 6 of the Act of March 14, 1900 above quoted was amended to read as follows:

"SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer, or any Assistant Treasurer of the United States in sums of not less than twenty dollars,

and to issue gold certificates therefor in denominations of not less than ten dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any national banking association may be counted as a part of its lawful reserve: * * *"

Section 6 of the Act of March 14, 1900 as amended by the Act of March 4, 1907, was again amended by the Act of March 2, 1911. The first portion of said section, after the amendment of 1911, reads as follows:

"SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer, or any Assistant Treasurer of the United States, in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than ten dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any nationl banking association may be counted as a part of its lawful reserve: * * *"

SUPREME COURT OF THE UNITED STATES.

No. 531.—October Term, 1934.

F. Eugene Nortz, *vs.* The United States. } On Certificate from the Court of Claims.

[February 18, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The facts certified by the Court of Claims may be thus summarized: Plaintiff brought suit as owner of gold certificates of the Treasury of the United States of the nominal amount of $106,300. He alleged that defendant, by these gold certificates and under the applicable acts of Congress, had certified that there had been deposited in the Treasury of the United States $106,300 in gold coin which would be paid to the claimant, as holder, upon demand; that at the time of the issue of these certificates, and to and including January 17, 1934, a dollar in gold consisted of 25.8 grains of gold, .9 fine; that claimant was entitled to receive from defendant one ounce of gold for each $20.67 of the gold certificates; that on January 17, 1934, he duly presented the certificates and demanded their redemption by the payment of gold coin to the extent above mentioned; that on that date, and for some time prior and subsequent thereto, an ounce of gold was of the value of at least $33.43, and that claimant was accordingly entitled to receive in redemption 5104.22 ounces of gold of the value of $170,634.07; that the demand was refused; that in view of the penalties imposed under the order of the Secretary of the Treasury, approved by the President, on January 15, 1934, supplementing the order of December 28, 1933, and the laws and regulations under which those orders were issued, which the claimant alleged were unconstitutional as constituting a deprivation of property without due process of law, claimant delivered the gold certificates to defendant under protest and received in exchange currency of the United States in the sum of $106,300 which was not redeemable in gold; and that in consequence claimant was damaged in the sum of $64,334.07, for which, with interest, judgment was demanded.

Defendant demurred to the petition upon the ground that it did not state a cause of action against the United States.

The questions certified by the Court are as follows:

"1. Is an owner of gold certificates of the United States, Series of 1928, not holding a Federal license to acquire or hold gold coins or gold certificates, who, on January 17, 1934, had surrendered his certificates to the Secretary of the Treasury of the United States under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum inasmuch as the weight of a gold dollar was 25.8 grains, nine-tenths fine, and the market price thereof on January 17, 1934, was in excess of the currency so received?

"2. Is a gold certificate, Series of 1928, under the facts stated in question 1 an express contract of the United States in its corporate or proprietary capacity which will enable its owner and holder to bring suit thereon in the Court of Claims?

"3. Do the provisions of the Emergency Banking Act of March 9, 1933, and the Order of the Secretary of the Treasury dated December 28, 1933, requiring the plaintiff as owner of gold certificates as stated in question 1 to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount, not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States?"

Defendant's demurrer, which admitted the facts well pleaded in the petition, did not admit allegations which amounted to conclusions of law in relation to the nature of the gold certificates or the legal effect of the legislation under which they were issued, held, or to be redeemed. *Dillon* v. *Barnard*, 21 Wall. 430, 437; *United States* v. *Ames*, 99 U. S. 35, 45; *Interstate Land Co.* v. *Maxwell Land Co.*, 139 U. S. 569, 577, 578; *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25, 43.

Gold certificates were authorized by section 5 of the Act of March 3, 1863 (12 Stat. 709, 711), which provided that the Secretary of the Treasury might receive "deposits of gold coin and bullion" and issue certificates therefor "in denominations of not less than twenty dollars each, corresponding with the denominations of the United States notes". The coin and bullion so deposited were to be retained in the treasury for the payment of the certificates on demand. It was further provided that "certificates representing coin in the treasury may be issued in payment of interest on the public debt, which certificates, together with those issued for coin and bullion deposited, shall not at any time exceed

twenty per centum beyond the amount of coin and bullion in the treasury". See R. S., sec. 254; 31 U. S. C. 428. Section 12 of the Act of July 12, 1882 (22 Stat. 165) contained a further provision authorizing the Secretary of the Treasury "to receive deposits of gold coin" and to issue certificates therefor, also in denominations of dollars as stated. The Act of March 14, 1900 (31 Stat. 45) prescribed that the dollar "consisting of twenty-five and eight-tenths grains of gold nine-tenths fine, . . . shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity". Section 6 of that Act also authorized the Secretary of the Treasury to receive deposits of gold coin and to issue gold certificates therefor, and provided that the coin so deposited should be held by the treasury for the payment of such certificates on demand and should be "used for no other purpose". And the latter clause appears in the amending Acts of March 4, 1907 (34 Stat. 1289) and of March 2, 1911 (36 Stat. 965). See 31 U. S. C. 429.

The Act of December 24, 1919 (41 Stat. 370) made gold certificates, payable to bearer on demand, "legal tender in payment of all debts and dues, public and private". And Section 2 of the Joint Resolution of June 5, 1933 (48 Stat. 113) amending the Act of May 12, 1933 (48 Stat. 52) provided that "all coins and currencies of the United States . . . heretofore or hereafter coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties and dues".

Gold certificates under this legislation were required to be issued in denominations of dollars and called for the payment of dollars.[1] These gold certificates were currency. They were not less

[1]The form of the gold certificates here in question is stated to be as follows:

"This certifies that there have been deposited in the Treasury of

THE UNITED STATES OF AMERICA
ONE THOUSAND DOLLARS

in gold coin payable to the bearer on demand.

"This certificate is a legal tender in the amount thereof in payment of all debts and dues public and private."

On the reverse side appear the following words:

"THE UNITED STATES OF AMERICA
ONE THOUSAND DOLLARS".

so because the specified number of dollars were payable in gold coin, of the coinage of the United States. Being currency, and constituting legal tender, it is entirely inadmissible to regard the gold certificates as warehouse receipts.[2] They were not contracts for a certain quantity of gold as a commodity. They called for dollars, not bullion.

We may lay on one side the question whether the issue of currency of this description created an express contract upon which the United States has consented to be sued under the provisions of section 145 of the Judicial Code, 28 U. S. C. 250. Compare *Horowitz* v. *United States*, 267 U. S. 458, 461.[3] We may assume that plaintiff's petition permits an alternative view. Plaintiff urges as the gist of his contention that, by the Acts of Congress, and the orders thereunder, requiring the delivery of his gold certificates to the Treasury in exchange for currency not redeemable in gold, he has been deprived of his property, and that he is entitled to maintain this action to recover the just compensation secured to him by the Fifth Amendment. But, even in that view, the Court of Claims has no authority to entertain the action, if the claim is at best one for nominal damages. The Court of Claims "was not instituted to try such a case". *Grant* v. *United States*, 7 Wall. 331, 338; *Marion & Rye Railway Co.* v. *United States*, 270 U. S. 280, 282. Accordingly, we inquire whether the case which the plaintiff presents is one which would justify the recovery of actual damages.

By section 3 of the Emergency Banking Act of March 9, 1933 (48 Stat. 2), amending section 11 of the Federal Reserve Act (39 Stat. 752), the Secretary of the Treasury was authorized, whenever in his judgment it was necessary "to protect the currency system

[2]The description of gold certificates in the reports of the Secretary of the Treasury, to which allusion was made in the argument at bar, could in no way alter their true legal characteristics. Reports for 1926, p. 80; 1930, pp. 29, 604, 607; 1933, p. 375.

[3]The point was not determined in United States v. State Bank, 96 U. S. 30, upon which plaintiff relies. The Court there decided that "where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party". The Court said that the basis of the liability was "an implied contract" by which the United States might well become bound in virtue of its corporate character. Its sovereignty was "in no wise involved".

of the United States", to require all persons "to pay and deliver to the treasurer of the United States any or all gold coin, gold bullion, and gold certificates" owned by them. Upon such delivery, the Secretary was to pay therefor "an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States". Under that statute, orders requiring such delivery, except as otherwise expressly provided, were issued by the Secretary on December 28, 1933, and January 15, 1934. By the latter, gold coin, gold bullion, and gold certificates were required to be delivered to the treasurer of the United States on or before January 17, 1934. It was on that date that plaintiff made his demand for gold coin in redemption of his certificates and delivered the certificates under protest. That compulsory delivery, he insists, constituted the "taking of the contract" for which he demands compensation.

Plaintiff explicitly states his concurrence in the Government's contention that the Congress has complete authority to regulate the currency system of the country. He does not deny that, in exercising that authority, the Congress had power "to appropriate unto the Government outstanding gold bullion, gold coin and gold certificates." Nor does he deny that the Congress had authority "to compel all residents of this country to deliver unto the Government all gold bullion, gold coins and gold certificates in their possession". These powers could not be successfully challenged. *Knox* v. *Lee,* 12 Wall. 457; *Juilliard* v. *Greenman,* 110 U. S. 421; *Ling Su Fan* v. *United States,* 218 U. S. 302; *Norman* v. *Baltimore & Ohio R. R. Co.,* decided this day. The question plaintiff presents is thus simply one of "just compensation".

The asserted basis of plaintiff's claim for actual damages is that, by the terms of the gold certificates, he was entitled, on January 17, 1934, to receive gold coin. It is plain that he cannot claim any better position than that in which he would have been placed had the gold coin then been paid to him. But, in that event, he would have been required, under the applicable legislation and orders, forthwith to deliver the gold coin to the Treasury. Plaintiff does not bring himself within any of the stated exceptions. He did not allege in his petition that he held a federal license to hold gold coin, and the first question submitted to us by the Court of Claims negatives the assumption of such a license. Had plaintiff received

gold coin for his certificates, he would not have been able, in view of the legislative inhibition, to export it or deal in it. Moreover, it is sufficient in the instant case to point out that on January 17, 1934, the dollar had not been devalued. Or, as plaintiff puts it, "at the time of the presentation of the certificates by petitioner, the gold content of the United States dollar had not been deflated" and the provision of the Act of March 14, 1900, *supra,* fixing that content at 25.8 grains, nine-tenths fine, as the standard unit of money with which "all forms of money issued or coined by the United States" were to be maintained at a parity, was "still in effect". The currency paid to the plaintiff for his gold certificates was then on a parity with that standard of value. It cannot be said that, in receiving the currency on that basis, he sustained any actual loss.

To support his claim, plaintiff says that on January 17, 1934, "an ounce of gold was of the value at least of $33.43". His petition so alleged and he contends that the allegation was admitted by the demurrer. But the assertion of that value of gold in relation to gold coin in this country, in view of the applicable legislative requirements, necessarily involved a conclusion of law. Under those requirements, there was not on January 17, 1934, a free market for gold in the United States or any market available to the plaintiff for the gold coin to which he claims to have been entitled. Plaintiff insists that gold had an intrinsic value and was bought and sold in the world markets. But plaintiff had no right to resort to such markets. By reason of the quality of gold coin, "as a legal tender and as a medium of exchange", limitations attached to its ownership, and the Congress could prohibit its exportation and regulate its use. *Ling Su Fan* v. *United States, supra.*

The first question submitted by the Court of Claims is answered in the negative. It is unnecessary to answer the second question. And, in the circumstances shown, the third question is academic and also need not be answered.

Question No. 1 is answered "No".